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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN AND COMPANY, INC.

Plaintiff,

v.

No. CIV 97-0485LH

AMERICA ONLINE, INC.,

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM DEADLINES PENDING DETERMINATION OF WHETHER ITS NEW LOCAL COUNSEL IS DISQUALIFIED FROM REPRESENTING DEFENDANT

Defendant America Online, Inc. ("AOL"), through its undersigned counsel, submits this memorandum in support of its motion for a temporary stay of certain litigation deadlines pending a ruling by this Court concerning Plaintiff's assertion that AOL's new local counsel in this matter, the law firm of Eaves, Bardacke & Baugh, P.A., has a conflict of interest that bars it from representing AOL.

FACTUAL STATEMENT

The facts and procedural developments relevant to AOL's motion are as follows:

1. Plaintiff Ben Ezra, Weinstein and Company, Inc. ("BEW") filed this action in New Mexico state court on March 11, 1997 and served AOL with the complaint on March 31, 1997.

2. AOL retained the Washington, D.C. law firm of Wilmer, Cutler & Pickering ("WC&P"), which has represented AOL in other lawsuits throughout the country, to be its lead counsel in this case. After service of the complaint, and in order to comply with the rules of the New Mexico state court and of this Court,

AOL retained the law firm of Browning & Peifer, P.A., to serve as its local counsel. See D.N.M. LR-Civ 83.3. Prior to this retention, the Browning firm assured WC&P that it had no conflicts of interest that would preclude it from being counsel for AOL.

3. On April 10, 1997, AOL, acting through its counsel WC&P and the Browning firm (with two of its in-house lawyers shown on the papers as "of counsel"), removed this case from state court to this Court.

4. By letter dated April 14, 1997, Joseph Mullins of the firm of Rodey, Dickason, Sloan, Akin & Robb, P.A., which had appeared as BEW's New Mexico counsel in this action, stated that the "principals" of BEW felt that the Browning firm was disqualified from representing AOL on account of a prior situation in which Mr. Browning had allegedly represented "colleagues" of BEW's principals. This letter said that BEW's "principals" had paid for the Browning firm's fees for representing these "colleagues." This letter made no claim that the Browning firm had ever had an attorney-client relationship with either BEW or its principals, nor did it assert that BEW or its principals had divulged confidential information to Mr. Browning. A copy of Mr. Mullins' letter to Mr. Browning is attached hereto as Exhibit A.

5. Mr. Browning forwarded a copy of Mr. Mullins' letter to WC&P and reassured WC&P that BEW and its principals had no basis to claim that they had ever had an attorney-client relationship with the Browning firm, much less one that would require

disqualification of the Browning firm in this case.

6. On April 17, 1997, Mr. Browning wrote back to Mr. Mullins explaining at length that the Browning firm had never had an attorney-client relationship with BEW or its principals and had no conflict of interest in representing AOL in this case. In this letter, Mr. Browning specifically said that he had explained to BEW's principals, one of whom was himself a lawyer, that he was not their lawyer. A copy of Mr. Browning's letter is attached as Exhibit B.

7. On April 18, 1997, another lawyer in the Rodey firm wrote a two-sentence letter to Mr. Browning asserting, without elaboration, that "BEW's principals strongly disagree with the matters set forth in" Mr. Browning's April 17, 1997 letter. Like the Rodey firm's earlier letter, this letter did not assert that BEW or its principals believed that they ever had a lawyer-client relationship with the Browning firm or that they had divulged confidential information to the Browning firm. A copy of the Rodey firm's April 17, 1997 letter is attached as Exhibit C.

8. On April 23, 1997, without explanation, the Rodey firm withdrew from representing BEW and was replaced by new counsel, including Esteban Aguilar.

9. On April 30, 1997, the Court entered its initial scheduling order in this case.

10. On May 7, 1997, Mr. Aguilar served counsel for AOL with a motion to disqualify <u>all</u> of AOL's lawyers from representing AOL in this case. The motion seeks disqualification not only of the Browning firm, but also of WC&P and <u>all</u> of AOL's in-house

lawyers. Affidavits from BEW's principals that are attached to the motion asserted, for the first time, that the Browning firm previously had an attorney-client relationship with BEW in connection with a matter involving a company named Casablanca. The motion alleges that this alleged prior representation gives rise to a conflict of interest that should be imputed to AOL's lead counsel (WC&P) as well as all of AOL's in-house attorneys. A copy of BEW's motion is attached as Exhibit D.

11. By letter dated May 12, 1997, WC&P informed Mr. Aguilar that, while AOL believes BEW's motion to disqualify is utterly meritless, AOL had decided, in the interests of avoiding unnecessary cost and delay and conserving judicial resources, to have the Browning firm withdraw as its local counsel and to have new local counsel appear on its behalf. This letter reiterated that the Browning firm had no conflict because it never represented BEW and because, in any event, the matter on which Browning was alleged to have represented BEW was not substantially related to BEW's suit against AOL. The letter further asserted that even if there were a basis for disqualifying the Browning firm, there would still be no basis for imputing that disqualification to WC&P or AOL's in-house attorneys. The letter requested that BEW withdraw its disqualification motion in light of AOL's substitution of new counsel. A copy of WC&P's letter is attached hereto as Exhibit E.

12. On May 12, 1997, AOL retained the law firm of Eaves, Bardacke & Baugh ("EB&B") to serve as its new local counsel, in

compliance with this Court's rules requiring non-resident counsel to associate with counsel admitted to practice in this state. See D.N.M. LR-Civ 83.3. Before consummating this retention, EB&B informed WC&P that it had performed a conflicts check and had no prior relationship of any sort with BEW or its principals.

13. On May 13, 1997, the Browning firm filed a motion to withdraw as counsel for AOL and EB&B filed a notice substituting itself, and specifically John Baugh, as new local counsel for AOL.

14. In a letter dated May 14, 1997, to WC&P, BEW's new counsel, Mr. Aguilar, represented that BEW would proceed with its effort to have this Court disqualify WC&P and AOL's in-house lawyers on the basis of a conflict of interest imputed from Mr. Browning. With this letter, Mr. Aguilar also served upon AOL a motion seeking leave to take Mr. Browning's deposition and to conduct other discovery (including, "if necessary," depositions of other AOL lawyers) to support its disqualification motion. Also included with the letter was a motion seeking an order vacating all dates set in the Court's initial scheduling order pending resolution of the disqualification motion. A copy of this letter is attached as Exhibit F. Copies of BEW's additional motions served with the letter are attached as Exhibits G and H.

15. In a separate letter dated May 14, 1997, to Mr. Baugh, Mr. Aguilar asserted that Mr. Baugh and his firm are themselves disqualified from representing AOL in this case on the basis of an allegation that Mr. Ben Ezra, one of the principals of BEW, had a conversation lasting fifteen or twenty minutes with Mr.

Baugh's partner, Paul Bardacke, in which Mr. Ben Ezra revealed confidences relating to the same "Casablanca" matter on which Mr. Browning is alleged to have previously represented BEW. This letter demanded that Mr. Baugh inform BEW's counsel whether his firm would withdraw from representing AOL. A copy of this letter is attached hereto as Exhibit I.

16. On May 15, 1997, Mr. Bardacke sent Mr. Aguilar a letter representing that he had absolutely no recollection of ever having met or talked with Mr. Ben Ezra with respect to any matter and stating his categorical belief that he did not have a conversation with Mr. Ben Ezra of the nature and duration alleged in Mr. Aguilar's May 14 letter. A copy of Mr. Bardacke's letter is attached hereto as Exhibit J.

17. On May 16, 1997, counsel for AOL (specifically, Mr. Baugh and Patrick Carome and Samir Jain of WC&P) spoke by telephone with Mr. Aguilar and requested his assurance that, in light of Mr. Bardacke's representations, BEW would refrain from asserting that Mr. Baugh and EB&B are disqualified from representing AOL. Mr. Aguilar declined to provide such assurance. Mr. Baugh and Mr. Carome also requested an assurance from Mr. Aguilar that, if AOL does not immediately discharge EB&B, BEW would not argue that, if AOL proceeds for the time being with EB&B as its counsel, BEW would not claim that EB&B's disqualification should be imputed to WC&P and AOL's in-house lawyers. Mr. Aguilar also declined to provide this assurance.

DISCUSSION

AOL submits that the foregoing recitation of facts is more

than sufficient, by itself, to demonstrate the necessity for the relief sought by AOL's present motion. Given these facts, AOL plainly has an urgent need for judicial resolution of the issue of whether EB&B is disqualified from representing AOL in this case. On the one hand, having just jettisoned the Browning firm in the face of what it believed to be a meritless disqualification attack, AOL is loathe to replace local counsel yet again simply because BEW has again thrown up what seems on its face to be a meritless claim for disqualification. Indeed, even if AOL were to yield to BEW's latest demand and go and find replacement local counsel yet again, unless it first "pre-cleared" its selection with BEW, there would be no assurance that its third choice would not also be one that BEW claimed had a conflict.

On the other hand, if AOL proceeds to litigate this case with Mr. Baugh and EB&B as its local counsel, BEW is sure to argue (as it has done with respect to Mr. Browning) that continued contact between EB&B and AOL's lead litigation counsel and its in-house counsel will automatically taint those other lawyers with EB&B's alleged conflict of interest. The threat of such an argument would cast a pall over WC&P's ability to consult and collaborate with Mr. Baugh and EB&B in every aspect of defending this case, including preparation of AOL's opposition to BEW's pending disqualification motion and measures to comply with the Court's Initial Scheduling Order.

It is only fair that AOL be released from this Catch-22 dilemma by entry of an order staying those aspects of this

litigation that require active participation of AOL's local counsel until after this Court has ruled on whether EB&B has a conflict of interest that bars it from representing AOL. Specifically, AOL requests that the Court stay its obligation to comply with the following deadlines:

(1) The deadline (currently May 22, 1997) for AOL's response to Plaintiff's Motion to Disqualify Defense Counsel, which seeks an order that Defendant's lead counsel, Wilmer, Cutler & Pickering ("WC&P"), and all of Defendant's in-house lawyers are disqualified from representing AOL in this case based on a theory (vigorously disputed by AOL) that AOL's original local counsel in this matter (James W. Browning) had a disqualifying conflict of interest that must also be imputed to all other defense counsel.

(2) The deadline (currently May 28, 1997) for AOL's response to Plaintiff's Motion for Leave to Take Limited Discovery, which seeks an order permitting Plaintiff to take depositions of Mr. Browning and perhaps other counsel for AOL for purposes related to the aforementioned motion to disqualify.

(3) The various deadlines established by this Court's Initial Scheduling Order, including most imminently the deadline of May 20, 1997 for the required meeting of counsel pursuant to Rule 26(f). (AOL's motion contemplates that both AOL's and BEW's obligations to comply with the deadlines of the Initial Scheduling Order would be temporarily suspended.)

(4) The deadline (currently May 19, 1997) for AOL's answer or other response to the Complaint.

While it is obvious that AOL would be severely prejudiced absent such relief, BEW, as the party that has raised the multiple disqualification issues and that has itself served AOL with a motion for relief from the initial scheduling order, cannot reasonably argue that it would be significantly prejudiced by structuring this litigation to permit resolution of the EB&B conflict issue at the outset. In order to minimize any prejudice to BEW resulting from this approach, EB&B is prepared to proceed expeditiously in bringing the issue of its alleged disqualification to a head.

AOL respectfully suggests that the Court establish a briefing schedule on the issue of EB&B's alleged disqualification. Because the burden of proof rests on the party seeking disqualification, AOL submits that BEW should submit its brief and supporting evidence first. A reasonable schedule would provide for BEW to submit its brief within ten days, and for AOL, through EB&B, to submit a responsive brief ten days thereafter. In the event that there are material factual disputes following such briefing, limited discovery or an evidentiary hearing may be necessary.

CONCLUSION

For all of the foregoing reasons, AOL respectfully requests that the Court grant its Motion for Relief From Deadlines Pending Determination of Whether Its New Local Counsel Is Disqualified.

Respectfully submitted,

WILMER, CUTLER & PICKERING

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and

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Attorneys for Defendant America Online, Inc.

Of Counsel
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May 16, 1997

We hereby certify that a copy of the foregoing pleading was mailed to all counsel of record this 15th day of May, 1997.

EAVES, BARDACKE & BAUGH, P.A.

5/16/97 (Fri) 12:48pm
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WRITER'S DIRECT NUMBER

April 14, 1997

VIA TELEFACSIMILE (243-6458)
James O. Browning, Esq.
Browning & Peter, P.A.
P.O. Box 25245
Albuquerque, NM 87125-5245

RE: Ben Ezra Weinstein v. AOL

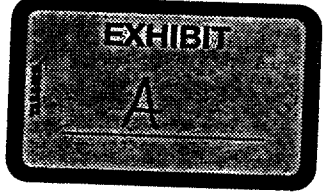
Dear Jim:

I am sorry I was in conference when you dropped by Thursday afternoon. If I had known you were coming, I would have tried to reschedule things.

I worked with you and Chuck for so many years, and my daughter, Cerianne, worked for you during law school, so it will be quite a change to be opposed to you. However, as you know, our principals feel strongly that your firm is disqualified from taking adverse representation in this case. I understand Rex Throckmorton has talked to you about their concerns which arise out of your recent representation of their colleagues which involved many hours of strategy planning, document drafting, and many other related interfaces between you and my principals in your office. I further understand that you were quite aware that our principals actually paid your fees in that representation about a year ago. As lawyers, we are getting such a bum rap these days, I know you will be sensitive to their feelings that your representation and your contacts with them are too closely related to the nature of this lawsuit to be appropriate.

Rex asked me to tell you that Catherine Goldberg is undertaking research on the issue of your disqualification, and we'll be back in touch with you if you do not voluntarily decide to give up this case. If you are really acting only as "a drop box," as you advised Rex, you really shouldn't mind.

In the meantime, my secretary understood you to make a couple of requests of me in relation to your representation in this case. Without waiving our strong objection to your representation, I respond as follows:



1. First, you have asked for a 32-day extension in which to plead in response to our complaint. Of course, I will acquiesce in your request, just as I know you will reciprocate. In fact, let us just consider that you are giving me a reservoir of 32 days which I may apply, as needed, to various deadlines that I will incur in the continued handling of this case. I also request that you obtain an Order allowing your requested extension, as I believe it is beyond that which would normally be approved by the Court, and we want to keep the court apprised on the record of such a lengthy extension. It might not give you the benefits you seek, if the Court proceeds with its usual alacrity to set Scheduling Orders, etc. Just send over your order for me to indicate my consent.

2. With regard to your request that we withdraw our Request for Production, Interrogatories, and Request for Admissions, I advise as follows:

a. If you will consider the Request for Production as at least the minimal of your Rule 26 Initial Disclosures of Documents, I have no problem with your request.

b. With regard to our Interrogatories, I see no reason to re-publish them, but I am willing to agree that you may consider them served as of the date we "meet and confer" pursuant to Rule 26(f).

c. Likewise, as to our Request for Admissions.

I trust this takes care of your concern about our outstanding discovery.

By the way, Jim, I propose that we limit required service to your firm and my firm, and then we can, as we see fit, take the responsibility for passing pleadings on to our co-counsel (and in your case, additionally house counsel).

Again, Jim, Rex (as well as the rest of those in the office who heard about this) have great confidence you will do the right thing and voluntarily withdraw.

Very truly yours,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: 
Joseph J. Mullins

JJM:br
cc: Paul Kennedy, Esq.

APR 2 2 1997

PAT CARD

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April 17, 1997

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HAND-DELIVERED

RE: Ben Ezra Weinstein and Company, Inc. v. American Online, Inc.

Dear Joe:

Please find enclosed a copy of Cole v. Ruidoso Mun. Schools, 43 F.3d 1373 (10th Cir. 1994), which states that a party seeking to disqualify opposing counsel on the ground of a former representation must establish that: (i) an actual attorney-client relationship existed between the moving party and the opposing counsel; (ii) the present litigation involves a matter that is "substantially related" to the subject of the movant's prior representation; and (iii) the interests of the opposing counsel's present client are materially adverse to the movant. See id. at 1384.

Your letter of April 14, 1997 does not contend that this firm ever represented Ben Ezra, Weinstein and Company, Inc. This firm has never represented Ben Ezra, Weinstein and Company, Inc.

Also, the present case is not substantially related to this firm's representation of Casablanca in its dispute with Ari Ma'ayan and Judith Thompson. Indeed, there is no relation between the two matters at all.

As the United States Court of Appeals for the Tenth Circuit has made clear, the existence of an attorney-client relationship is not dependent upon the payment of fees. See id. See also Westinghouse Electric Corp. v. Kerr McGee Corp., 580 F.2d 1311, 1317 n. 6 (7th Cir.), cert. denied, 439 U.S. 955 (1978). Ben Ezra, Weinstein and Company, Inc. must show that (i) it submitted confidential information to this firm and (ii) it did so with the reasonable belief that the firm was acting as Ben Ezra, Weinstein Company, Inc.'s attorney. Any strategy planning, document

EXHIBIT 6

drafting, or meetings with anyone from Ben Ezra, Weinstein and Company were not privileged and were undertaken solely for the purpose of representing Casablanca; when I communicated with Casablanca's principals about confidential matters, representatives of Ben Ezra, Weinstein and Company were excluded. Ben Ezra, Weinstein and Company were, at those times, reminded that it was not this firm's client. As you know, at least one of your client's principals is an attorney, and he acknowledged that he understood his firm was not my client and that he understood why he could not sit through certain meetings with any client or be involved in certain telephone calls with Mr. Cutler and Ms. Ulberg.

You should know that this law firm did not represent Mr. Cutler or Ms. Ulberg; Mr. Bill Arland represented them as individuals. If Mr. Cutler and Ms. Ulberg could not claim they as individuals had an attorney-client relationship with this firm -- even though we did have confidential communication with them as the representatives of Casablanca -- clearly Ben Ezra, Weinstein cannot claim an attorney-client relationship. Many times a representative of a corporate client asserts that an attorney-client relationship existed between the representative and the law firm because the representative believes he consulted with its attorneys on "sensitive" issues and acted on its advice. Cole v. Ruidoso Mun. Schools, 43 F.3d at 1384. The courts have uniformly held, however, that the alleged former client's subjective belief is not sufficient to establish an attorney-client relationship. See, id.; Kubin v. Miller, 801 F. Supp. 1101, 1115 (S.D.N.Y. 1992)(citing United States v. Kephlinger, 776 F. 2d 678, 701 (7th Cir. 1985), cert. denied, 476, U.S. 1183 (1986)). In addition to having a subjective belief that there was an attorney-client relationship, the belief must have been reasonable. See Cole v. Ruidoso v. Mun. Schools, 43 F.3d at 1384; Nelson v. Green Builders, Inc., 823 F. Supp. 1439, 1445 (E.D. Wis. 1993).

Moreover, even if existence of an attorney-client relationship could be established, which cannot be done here, the Court must also determine whether there is a "substantial relationship" between the present and prior representation. See, e.g., Cole v. Ruidoso Mun. Schools, 43 F.3d at 1384; SLC, Ltd. V v. Bradford Group West, Inc., 999 F.2d 464, 466-67 (10th Cir. 1993). A substantial relationship exists "if the factual contexts of the two representations are similar or related." See Cole v. Ruidoso Mun. Schools, 43 F.3d at 1384 (quoting Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985)). "The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." ABA Model 1.9(a) & (c).

The District Court will find that Ben Ezra, Weinstein cannot

establish either of these two essential elements.

Here, there is no reasonable basis for any contention by Ben Ezra, Weinstein, if it files a motion, that Browning & Peifer, P.A. represented it. Any motion to disqualify would have to ignore the fact that its discussions with Browning & Peifer, P.A. were solely for the purpose of assisting Browning & Peifer, P.A. carry out its duties as lawyer for Casablanca. Rule 1.13 provides that a lawyer employed or retained by an organization represents the organization, which can act only through its duly authorized constituents. Although a lawyer is obligated not to disclose the information revealed by the client's constituents or employees, "'[t]his does not mean, . . ., that constituents of an organization client are the clients of the lawyer.'" Rule 1.13. See also Bieter Co. v. Blomquist, 132 F.R.D. 220, 224 (D. Minn. 1990)(holding that law firm which had formerly represented joint venture was not disqualified from representing opposing party in subsequent suit against two of venture's constituents). Any information that Ben Ezra, Weinstein communicated to this law firm on behalf of Casablanca was not protectable confidential communication of Ben Ezra, Weinstein to the firm. It is Casablanca which, as the client, holds the right to have these communications protected and which may decide whether and to whom that information may be disclosed. It is therefore clear that Ben Erza, Weinstein is not a former client of Browning & Peifer, P.A. and that there is no chance of improper disclosure of client confidence. Any motion to disqualify will be denied.

As you can see, there is no basis for a motion to disqualify. We are confident that you, Rex, and Cathy will reach the same conclusion.

I do not know what I could have said to Rex to make him conclude this law firm was a "drop box." That is not a phrase I use to describe our firm's work. I hope that I will have a substantive role in the representation of AOL in this case.

Best regards.

Sincerely yours,

BROWNING & PEIFER, P.A.

By: James O. Browning

JOB/cm
Enclosure: a/s

COPY

① file - AOL/BCW/corr. w/ Cover
② cc - Payton, Jain

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APR 2 8 1997

PAT CARONE

April 18, 1997

VIA FACSIMILE AND U.S. MAIL

James O. Browning, Esq.
Browning & Peifer, P.A.
PO Box 25245
Albuquerque, New Mexico 87125-5245

Re: Ben Ezra, Weinstein and Company, Inc. v. America Online, Inc.

Dear Jim:

I have passed along to Ben Ezra, Weinstein and Company, Inc. ("**BEW**"), your letter of April 17, 1997 addressed to Joe Mullins. After considering your letter, BEW's principals strongly disagree with the matters there set forth and reiterate their view that your firm is disqualified from representing AOL in BEW's suit against it.

Very truly yours,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By
Catherine T. Goldberg

CTG:rrf

Enclosures

cc: Mikey Weinstein
Ben Ezra

H:\CTG\11137\33887\BROWNING.418

EXHIBIT

RECEIVED
APR 19 1997
BY:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN, AND
COMPANY, INC.

Plaintiff,

vs.

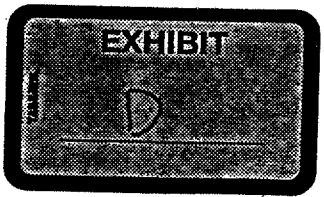
NO. CIV 97-0485 LH/LFG

AMERICA ONLINE, INC.

Defendant.

PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL FOR DEFENDANT AMERICA ONLINE, INC.

Plaintiff Ben Ezra, Weinstein, and Company, Inc. (BEW) by and through its attorneys of record, Esteban A. Aguilar and Moses, Dunn, Farmer & Tuthill, P.C. by Mark A. Glenn, Pepper, Hamilton & Scheetz by Paul Kennedy and hereby moves to disqualify counsel for Defendant America Online, Inc. (AOL). BEW seeks to disqualify James O. Browning and Browning & Peifer, P.A., AOL's local counsel. BEW also seeks to disqualify Randall J. Boe, Elizabeth deGarzia Blumenfeld, AOL's in-house counsel; AOL's in-house legal staff; and Wilmer, Cutler & Pickering, AOL's national counsel. As grounds for its Motion, BEW states that Browning & Peifer, P.A., previously represented BEW, confidential information was communicated to Browning & Peifer, and the subject of the prior representation is substantially related to the present litigation. BEW further states that Browning & Peifer's disqualification should be imputed to Mr. Boe, Ms. Blumenfeld, the AOL in-house legal staff, and Wilmer, Cutler & Pickering because they are currently associating



with Browning & Peifer in the pending litigation. BEW therefore respectfully requests that the Court grant its Motion to Disqualify.

Pursuant to LR 7.5, BEW submits the following documents in support of this Motion:

1. Memorandum Brief in Support of Motion to Disqualify Defendant's Counsel;
2. The Affidavit of Jack Ben Ezra, with attached exhibits, as Exhibit 1;
3. The Affidavit of Michael L. Weinstein, with attached exhibits, as Exhibit 2;

Counsel for BEW requested that Browning & Peifer, P.A. withdraw from representing AOL and the request was refused.

WHEREFORE, Plaintiff Ben Ezra, Weinstein, and Company, Inc. moves the Court to disqualify counsel for Defendant America Online, Inc.

Respectfully submitted,

Esteban A. Aguilar, Esq.
1011 Lomas NW
Albuquerque, NM 87102
(505) 242-6677

Original signed by
By: ESTEBAN A. AGUILAR
Esteban A. Aguilar

Co-counsel for Plaintiff

Paul J. Kennedy, Esq.
Donna E. Correll, Esq.
PEPPER, HAMILTON & SCHEETZ, LLP
3000 Two Logan Square
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Philadelphia, PA 19103

Mark A. Glenn, Esq.
MOSES, DUNN, FARMER &
TUTHILL, P.C.
P. O. Box 27047
Albuquerque, NM 87102
(505) 843-9440

I hereby certify that a copy
of the foregoing pleading
was hand-delivered to the following counsel of record on this 7th day of May 1997:

James O. Browning, Esq.
Attorney for Defendant
20 First Plaza, Suite 725
Albuquerque, NM 87102

and via Overnight Mail and via Facsimile Transmission to the following counsel of record:

WILMER, CUTLER & PICKERING
Patrick J. Carome, Esq.
John Payton, Esq.
Samir Jain, Esq.
2445 M Street NW
Washington, D.C. 20037

and via Overnight Mail to
the following counsel of record:

Randall J. Boe, Esq.
Elizabeth deGrazia Blumenfeld, Esq.
America Online, Inc.
22000 AOL Way
Dulles, VA 20166-9323

Esteban A. Aguilar

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN AND COMPANY, INC.

Plaintiff,

v.

NO. CIV 97-0485 LH/LFG

AMERICA ONLINE INCORPORATED,

Defendant.

AFFIDAVIT OF JACK BEN EZRA

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

I, Jack Ben Ezra, being duly sworn under oath, state as follows:

1. I am over the age of eighteen (18) years and give the facts stated in this affidavit of my own personal knowledge. If called upon to do so, I could and would competently testify to the matters set forth in this affidavit.

2. I am chief executive officer of Ben Ezra, Weinstein and Company, Inc., ("BEW") the Plaintiff in the above-captioned and numbered litigation. The chief operating officer, Michael L. Weinstein ("Weinstein"), and I (together, "we" or "us") are the two principals of BEW. BEW is an Albuquerque-based company that manufactures and markets corporate finance software products and provides technical Internet consultation for clients who would like to attempt to conduct corporate financing over the World Wide Web.

3. Around October 1995, BEW was approached by the principals of two

Exhibit 1

corporations, Casablanca, Inc. and Casablanca Enterprises International, Ltd., Inc. (together, "Casablanca"). The principals, Ari Ma'ayan ("Ma'ayan"), Joel Cutler ("Cutler") and Mary Ulberg ("Ulberg"), sought BEW's assistance in advising them regarding technology and techniques available for assisting them in raising capital for Casablanca.

4. Ma'ayan represented to us that he had a distinguished military, business, academic and philanthropic record, as well as the fact that he was a courageous cancer survivor, and that he had taken out a mortgage on his home so that he could directly invest $200,000.00 in Casablanca.

5. Based upon these and other representations by Ma'ayan, and at Ma'ayan's specific request, BEW informally communicated to several potential investors the fact that Casablanca was currently conducting a bridge financing as a preparatory step to an anticipated, subsequent, Internet financing for which BEW would be providing technical Internet consulting to Casablanca. BEW's technical Internet consulting did not include legal/corporate finance, financial printing or accounting services which were to be separately contracted and paid for by Casablanca as necessary predicates to their attempted Internet financing. Through the private fund-raising efforts of the principals at Casablanca, approximately $100,000.00 in capital was raised from these several investors. At no time did BEW request, or receive, any compensation for the aforementioned informal assistance to Ma'ayan's request for help.

6. However, Casablanca soon ran into financial trouble and needed more money to meet its payroll in late 1995. Pursuant to Casablanca's emergency requests, I personally loaned Casablanca approximately $36,000.00 during the last four months

of its existence in a last ditch effort to enable it to meet day-to-day expenses long enough to restructure its operations within a workable cash-flow budget.

7. The principals at Casablanca asked BEW's help to assist them in identifying more potential investors. We were suspicious about some of the representations Ma'ayan had made to us and others about his personal, professional and academic background and the business operations at Casablanca.

8. After some investigation in December 1995, we discovered that Ma'ayan had made numerous false statements about his personal background, including his military service record, and about the operations of Casablanca.

9. In the presence of Casablanca's two other principals, Cutler and Ulberg, Weinstein and I confronted Ma'ayan in early January 1996 with the results of our investigation into his background. Ma'ayan immediately resigned as chief executive officer of Casablanca.

10. In February 1996, Cutler and Ulberg notified us that Ma'ayan was threatening to sue them and Casablanca to recover an alleged unpaid debt of $200,000.00.

11. Around the same time, Ma'ayan also told me that he was going to "get me" and made it clear that he would see to it that I was "going to jail" for "f**king him."

12. Cutler and Ulberg specifically asked us to find legal counsel to advise them regarding Ma'ayan's threatened legal action.

13. After interviewing several attorneys, I approached a friend, Jane Wishner, and asked her if she could refer me to an Albuquerque attorney who was familiar with

securities laws and litigation.

14. Ms. Wishner recommended that I talk with her former law partner, James O. Browning ("Browning") with the Albuquerque law firm of Browning & Peifer, P.A.

15. I telephoned Browning's office in February 1996 and he returned my call later the same day. During this conversation I told Browning the facts about Ma'ayan's threatened litigation, and BEW's and my personal role in Ma'ayan's ouster from Casablanca.

16. I told Browning that Ma'ayan's threats against Cutler, Ulberg and Casablanca were an attempt at revenge on BEW, myself and Weinstein. I specifically told Browning that Ma'ayan was determined to launch a vendetta against BEW, Weinstein and myself, and that a strong showing of resolve might deter Ma'ayan from following through on threats to ruin our lives.

17. During this initial interview, I also advised Browning that either I or BEW would be responsible for and would pay his fees for legal services.

18. During this initial interview, I advised Browning that I fully expected that I, BEW and Weinstein would be named as defendants in any litigation filed by Ma'ayan.

19. Weinstein then interviewed Browning by telephone and we agreed that Browning would be a good choice for counsel.

20. During our initial interview, Browning advised me that he would require a $5,000.00 retainer to undertake the representation. I gave Cutler and Ulberg $5,000.00 to pay Browning's requested retainer. I also asked Browning to send bills to Casablanca, with copies to BEW for any additional fees that might be incurred.

21. During the course of Browning's representation, BEW received directly from Browning & Peifer, P.A. additional bills for $1,524.87. This amount was paid by two BEW checks No. 1553 dated May 16, 1996, and No. 1070 dated June 15, 1996.

22. At one point in Browning's representation, he and I had a ten-minute telephone conversation during which we discussed the possibility of pursuing a declaratory judgment lawsuit on behalf of BEW, Weinstein and me against Ma'ayan.

23. After I told Browning the facts, he advised me that he would not pursue a declaratory judgment action against Ma'ayan unless he received a $75,000.00 retainer. During this discussion, I disclosed to Browning confidential financial information.

24. During the first three weeks after Browning was retained, I had several extensive conversations with him about the history of our dealings with Casablanca and its principals. I disclosed to Browning specifics about BEW's financial status, its corporate history and strategies, as well as possible areas of concern in any litigation that would result.

25. I also discussed with Browning BEW's litigation strategies and how we wanted him to handle particular legal situations that could or did arise. BEW directed Browning's representation with the consent of Cutler and Ulberg.

26. During Browning's representation, he told me on several occasions that he was confused about who he would ultimately represent and who exactly was his client.

27. At one point, I asked Browning directly if he would ever represent Cutler, Ulberg, or Casablanca in any dispute against myself, Weinstein or BEW. Browning told me, "No."

28. I also made it clear to Browning that in the event of any lawsuit by Ma'ayan, I expected him to represent me, BEW, and Weinstein.

29. During the course of his representation, Browning freely consulted with me or Weinstein about how to proceed in response to various situations that arose. Drafts of correspondence were sent to BEW by Browning for our review and comments. On more than one occasion during these discussions, Browning said, "It's your nickel," and asked for guidance regarding all aspects of the negotiations.

30. I believed that our discussions were protected from disclosure by the attorney-client privilege. I wrote "PRIVEDGED PROPRIETARTY AND CONFIDENTIAL" [sic] at the top of a draft letter I prepared on behalf of Ulberg, Cutler, and Casablanca for Browning to send to Spencer Reid, the attorney for Ma'ayan. A true and correct copy of this draft letter is attached hereto as **Exhibit "1"**. I believe I sent this draft letter directly to Browning or to Ulberg and Cutler to forward to Browning.

31. In a letter (page 5) dated February 15, 1996, to the attorney representing Ma'ayan, Browning made representations on behalf of BEW, as well as on behalf of Casablanca. A true and correct copy of this letter is attached hereto as **"Exhibit 2"**.

32. I believed that I, Weinstein and BEW were Browning's clients. I disclosed to him highly sensitive information about BEW's financial condition, the way it would handle particular litigation situations, and other confidential and proprietary information. In addition, I or BEW paid all of his fees.

33. I believe that Browning already has disclosed or will disclose much of the financial information, litigation strategies and other highly confidential information that he

obtained from me, Weinstein and BEW to Defendant America Online, Inc. ("AOL") and/or its counsel and use it to the detriment of BEW in the pending litigation.

34. After March 1996, Cutler's spouse and Ulberg sent separate communications to me expressing their hostility for how the situation was handled. Based upon his past relationship with Cutler and Ulberg, Browning could obtain information adverse to BEW from Cutler and Ulberg.

35. I believe that if Browning uses the confidential information regarding BEW or discloses that information to AOL's in-house and national counsel, BEW's position in this litigation will be irreparably harmed.

36. I do not believe it will be possible to determine the harm to BEW resulting from the use or disclosure of the confidential information that BEW communicated to Browning.

37. After BEW filed its Complaint to Recover Property Damages, AOL issued a statement to the media claiming that BEW's lawsuit was frivolous and that BEW was suing AOL for publicity. BEW's responding statement released to the media set forth reasons why it was compelled to bring an action against AOL. True and correct copies of AOL's statement released to the press and BEW's statement in response are attached hereto as **Exhibit "3"** and **Exhibit "4"** respectively.

FURTHER AFFIANT SAYETH NAUGHT.

Jack Ben Ezra

ACKNOWLEDGED AND SWORN TO before me on May 6th, 1997, by Jack Ben Ezra.

My commission expires 4/2000.

NOTARY PUBLIC

OFFICIAL SEAL
Cristya Abrams
NOTARY PUBLIC
STATE OF NEW MEXICO
My Commission Expires: 4/2000

privedged, proprietarty and confidential

Spencer Reid, Esq
Keleher and McLeod, P.A.
P.O. Drawer M
Albuquerque, NM 87163
fax (505) 764-9643

Re: Ma'ayans et. al./Casablanca E.I. Ltd

Dear Spence:

Mr. Joel Cutler and Ms. Mary Ulberg are prepared to accept, for the moment, that Mr. Ma'ayan's assertion that his misrepresentations and prevarications regarding his military experience have no direct bearing upon his abilities, strengths and functions as a corporate manager. To this end, they propose the following:

Mr. Ma'ayan will be immediately reinstated as C.E.O and Chairman of CEI. Ltd, and will be likewise immediately reinstated as a Director of CEI. Ltd and as a Director of Casablanca, Inc. CEI. Ltd will terminate forthwith its relationship with the firm of Ben Ezra, Weinstein and Company and subsequently rely solely upon Mr. Ma'ayan to direct all capital raising efforts. It is my understanding that Ben Ezra, Weinstein and Company have agreed to waive any and all claims against CEI. Ltd, Casablanca, Inc., Mr. Cutler, Ms. Ulberg and Mr. Ma'ayan, and to not seek compensation for its current provision of pecuniary recision options to its particular investors in CEI. Ltd. CEI. Ltd will agree to waive any and all claims against Ben Ezra, Weinstein and Company. Furthermore, it is my understanding that Ben Ezra, Weinstein and Company agree to timely return all shares of CEI. Ltd common stock which it presently owns (100,000 shares) to the company and to subordinate to last place $49,900 in loans to CEI. Ltd. It will not, however, per Mr. Cutler and Ms. Ulberg, waive a $10,000 personal loan made to Mr. Ma'ayan in late 1995, however, and repayment of said loan is a condition of the termination of Ben Ezra, Weinstein's relationship with CEI. Ltd.

Referencing the attached photocopy of pages 9 - 10 inclusive of the CEI. Ltd business plan, the writing of which was directly overseen and approved personally by Mr. Ma'ayan, CEI. Ltd. requests that Mr. Ma'ayan objectively demonstrate that the pertinent points of his business and professional history are true and accurate. Such incontrovertable demonstration would support the accuracy of his assertions that there ought not to be and, in point of actual fact, is no linkage between the matters of his admitted fabrication of his military experience and his business and professional experience as textually referenced in the CEI Ltd business plan. It was this business plan which was provided *inter alia* to those individuals who invested in the CEI Ltd. bridge financing, secure in the knowledge that CEI Ltd. was being well managed by

an individual of Mr. Ma'ayan's business and professional experience and related stature as reflected on pages 9 and 10 of that document.To wit:

"Ari Ma'ayan is a seasoned executive with over 25 years of management experience." Please have Mr. Ma'ayan detail the "25 years" of management experience cited. Please submit company names, addresses, job titles and a brief description of duties and salary compensation, as well as contact persons at each previous employer or client. This narrative should take the form of a time line. The management aspect of each position must be stressed, including concrete examples of his successes.

"Ma'ayan is fluent (emphasis added) in four languages." Please state which four languages and submit a demonstration of fluency (either by translating a document to be submitted by an independent party or by submitting college credits equal to three years of language studies for each language.

"Ma'ayan is an expert at improving business operations as evidenced by his ability to acquire a British organization which was operating at a 120,000 pound/month deficit and turn it into a 120,000 pound/month net profit operation within six months." (emphasis added) Please provide the name of the company, a detailed sumary of Mr. Ma'ayan's role, including title/titles held during the six months cited, and the names of officers at the company who can verify Mr. Ma'ayan's claim that the primary responsibilty for the turnaround is his.

"Currently Ma'ayan is President and COO of Sandia Strategic Services, Inc. a management consulting firm in Albuquerque, NM. In this and other consulting positions he has guided and assisted over 120 companies and government laboratories, accumulating over 20 years experience in the business consulting field." Please list the "over 120 companies and government laboratories" cited by Mr. Ma'ayan. List dates, compensation, contact names and provide brief summaries of duties and responsibilties. Also, please specify the companies and institutions Mr. Ma'ayan has worked with during his accumulation of "20 years" of experience in the business consulting field utilizing a timeline format. In addition, please list the clients, contact names, and compensation history for Mr. Ma'ayan during his tenure at SandiaStrategic Services. Special emphasis should be placed on the successes of his consulting history. Please list the names of any companies for which Mr. Ma'ayan obtained significant (defined as in excess of $100,000) funding, brought public, increased bottom line efficiency, oversaw product development or forged strategic partnerships. Special emphasis should be given to detailing the positive financial successes brought about through Mr. Ma'ayan's involvement.

"This experience has made Mr. Ma'ayan an expert in venture capitalization, strategic planning, product development, future forecasting, market development, OEM agreements, corporate partnering, technology transfer, process development and facilities development and management" (emphasis added). Please detail the precise situational experiences under which Mr. Ma'ayan became "expert" in all of the cited areas. Include college or graduate degrees, membership in learned or professional organizations and any papers published that will tend to fairly and acurately qualify Mr. Ma'ayan as an "expert" in each of the ten fields listed by him.

Finally, Mr. Ma'ayan states that he has held the "position of Director, CEO, President or Vice President for six organizations worldwide." Please list these organizations as well as Mr. Ma'ayan's compensation, and a detailed description of the level of success or failure which these companies attained during their association with Mr. Ma'ayan, and contact persons at each of these half dozen organizations.. Clearly, my clients are interested in concrete examples of his role as corporate officer or Director.

Ms. Ulberg and Mr. Cutler truly wish to extend to Mr. Ma'ayan the benefit of the doubt regarding his argument that deceit in one part of life does not necessarily carry over into other areas. They hope that Mr. Ma'ayan takes this offer in the cooperative spirit it is extended, and they look forward to Mr. Ma'ayan demonstrating the veracity of his claims. Once this is accomplished, they believe that this matter will be settled amicably and professionally, without an expensive, lenghthy and essentially destructive storm of litigation for all parties involved.

Hopefully, the information sought by Mr. Cutler and Ms. Ulberg is readily available to Mr. Ma'ayan since his biography was written by him less than a year ago. However, we look forward to a positive response no laterthan March 6, 1996. In the event Mr. Ma'ayan requires additional time to complete the compilation of this information, my clients are happy to provide a reasonable extension of time to do so. Should Mr. Ma'ayan believe that Ms. Ulberg and Mr. Cutler cannot evaluate his informationobjectively, Mr. Cutler and Ms. Ulberg agree to immediately provide adequate funds for an independent third party, to be mutually agreed upon by respective counsel, to perform timely due diligence and evaluation of this information provided by Mr.
Ma'ayan in support of those particular statements (*infra*) in the CEI Ltd. business plan he authored. Mr. Cutler, Ms. Ulberg and Ben Ezra Weinstein and Company will agree to be unilaterally bound by such a third party's ultimate decision should Mr. Ma'ayan elect to use the services of a mutually agreed upon independent third party.

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My clients genuinely believe that if they are incorrect in their belief that Mr. Ma'ayan has misled and lied to them regarding his business and professional experience, and that his admitted, deliberate and comprehensive lying and intentional misrepresentations regarding his military experience are indeed compartmentalized, they owe him not only an apology but the expeditious settlement referenced *infra* upon confirmation of the accuracy and truthfulness of his representation of his business and professional experience as personally detailed in the CEI Ltd. business plan.

Very Truly Yours

BROWNING & PEIFER, P.A.
ATTORNEYS AND COUNSELORS AT LAW
[illegible]
[illegible]
ALBUQUERQUE, NEW MEXICO 87125-5245
(505) 247-4800

JAMES G. BROWNING
CHARLENE B. PEIFER
JOHN FITZPATRICK CARR
WILLIAM "BO" PRATHER
RAYMOND G. HURTT

FACSIMILE
(505) 243-6443

February 15, 1996

FAXED

VIA FACSIMILE
and First-Class Mail
(505)764-9643

Mr. Spencer Reid
Keleher & McLeod, P.A.
414 Silver Ave. S.W.
P.O. Drawer AA
Albuquerque, NM 87102

RE: Ma'ayan v. CKI, Ltd./Casablanca, Inc.

Dear Spence:

I too appreciated the opportunity to talk to you on February 8, 1996, and your letters of February 9th and February 15th. We appreciate your interest in trying to resolve this matter without litigation. As we discussed at our meeting, there is no scenario involving litigation or bankruptcy that benefits anyone.

You misunderstood our comments about Mr. Ma'ayan's misrepresentation and prevarications regarding his military experience. Neither our purpose nor intent is to embarrass Mr. Ma'ayan. But we all know that Mr. Ma'ayan passed himself off as a high ranking, highly decorated Vietnam veteran, with many stories of what went on "back in 'Nam." Mr. Cutler and others confronted Mr. Ma'ayan about this and other lying on or about January 3, 1996, and Mr. Ma'ayan admitted that he was a pathological liar; that he had never been in Vietnam; and that he was so very ashamed that he had lied to Mr. Cutler and Ms. Ulberg. Incredibly, just one week later, in front of Mr. Cutler, Mr. Ma'ayan was again talking about being "back in 'Nam," describing his encounters with mortar shells, bunkers, and, in general, the war.

I assume that the reason you think our discussion of Mr. Ma'ayan's lying about his military record is irrelevant and merely an attempt to embarrass Mr. Ma'ayan is because of your mistaken assumption that Mr. Cutler and Ms. Ulberg did not rely on Mr. Ma'ayan's proclaimed military background. In fact, they did rely on Mr. Ma'ayan's representations to being a high-ranking, highly decorated Vietnam veteran. He spoke

directly to Mr. Cutler and Ms. Ulberg about his military experience and career. Mr. Cutler and Ms. Ulberg relied upon his representations about his highly decorated combat experience as indicative of his general leadership ability and qualifications. Casablanca chose Mr. Ma'ayan because of his leadership experience. Indeed, Casablanca would not have been involved with Mr. Ma'ayan in the business or in the loan but for Mr. Ma'ayan's lies about his leadership abilities. And that is the precise result and effect Mr. Ma'ayan intended to have with his lying. The very definition of "pathological liar" includes that there is a "pathology" to the lying.

You also know that, under the law of evidence, Mr. Ma'ayan's lying about his military record is not immaterial to the issues about the promissory note. We do intend to show the Court that, on the majority of pertinent matters, Mr. Ma'ayan does not tell the truth. We believe that we will convince the Court that Mr. Ma'ayan is, as he has admitted, a pathological liar, and that his testimony on the issues, including those that have a direct bearing on his stated abilities, strengths and leadership experience as a corporate manager, were seriously embellished and misrepresented.

Please find attached copies of pages 9 and 10 of CEI Ltd's business plan. Mr. Ma'ayan personally authored and approved its publication for prospective stockholder consumption. It was this business plan that was provided, among others, to those individuals who invested in the CEI Ltd. bridge financing. Based on the same information provided by Mr. Ma'ayan, Mr. Cutler and Ms. Ulberg felt secure in their knowledge that CEI Ltd. was being well managed by an individual of Mr. Ma'ayan's business and professional experience and related stature.

We have reason to believe, through our continuing due diligence investigations, that we will be able to demonstrate, by objective criteria, that pertinent points of Mr. Ma'ayan's business and professional history are materially untrue and inaccurate. While Mr. Ma'ayan suggests that his lying is a problem of the past, and isolated, his biography as published in the business plan was written by him less than a year ago. Specifically, the following statements and representations of his business and professional experience, as personally detailed in the CEI Ltd. business plan by Mr. Ma'ayan, appear to be grossly overstated and unfounded, or at least cannot be confirmed as to accuracy and truthfulness:

1. "Ari Ma'ayan is a seasoned executive with over 25

years of management experience." We no longer believe that Mr. Ma'ayan has 25 years of management experience. We have been unable to date to discover names and addresses of most of these companies, or Mr. Ma'ayan's job titles, duties and salary compensation. Indeed, we have been unable to discover contact persons at previous employers or clients. We have been unable to put this management experience in a definitive time line. We believe that the evidence will show that, while Mr. Ma'ayan might have been in some capacity of management, at some companies, we find no concrete examples of either stated successes or demonstrated skills supporting his published claims. We believe that the evidence will show that there were substantially less management aspects to many of Mr. Ma'ayan's prior positions and that there are extremely few, if any, concrete examples of successes.

2. "Ma'ayan is an expert at improving business operations as evidenced by his ability to acquire a British organization which was operating at a 120,000 pound/month deficit and turn it into a 120,000 pound/month net profit operation within six months." We have been unable to discover: (i) the name of this company; (ii) detailed information about Mr. Ma'ayan's role; or (iii) the title or titles held by Mr. Ma'ayan during the six months he cites. Most importantly, we have been unable to discover the names of officers at the company who can verify Mr. Ma'ayan's claim that the primary responsibility for the turnaround is his.

3. "Currently Ma'ayan is President and COO of Sandia Strategic Services Inc. a management consulting firm in Albuquerque, NM. In this and other consulting positions he has guided and assisted over 120 companies and government laboratories, accumulating over 20 years experience in the business consulting field." We have not been able to compile a list of "over 120 companies and government laboratories," as cited by Mr. Ma'ayan, nor have we been able to compile dates, compensation, contact names, or the duties and responsibilities of Mr. Ma'ayan that demonstrate the extent of Mr. Ma'ayan's "guidance and assistance." We have also been unable, again, to develop any useful time line format. Because we have been unable to specify the companies and institutions that Mr. Ma'ayan has worked with, we no longer believe that he has accumulated "20 years" of experience in the business consulting field. In addition, we have been unable to compile a list of clients, contact names, or compensation history for Mr. Ma'ayan during his tenure at Sandia Strategic Services. For example, not only have we been unable to list the names of companies for which Mr. Ma'ayan

secured significant (in excess of $100,000) funding, we have been unable to detect that Mr. Ma'ayan brought public or increased bottom line efficiency for other companies. We especially have not been able to detect definitive successes in his consulting history in regard to his published claims.

4. "This experience has made Mr. Ma'ayan an expert in venture capitalization, strategic planning, product development, future forecasting, market development, OEM agreements, corporate partnering, technology transfer, process development and facilities development and management." We have been unable to discover any details of the precise situational experiences under which Mr. Ma'ayan became an "expert" in all of the cited areas. We have been unable to learn college or graduate degrees, membership in learned or professional organizations or any papers published that would tend to fairly and accurately qualify Mr. Ma'ayan as an "expert" in each of the ten fields listed by him.

5. Mr. Ma'ayan states that he has held the "position of Director, CEO, President or Vice President for six organizations worldwide." We acknowledge that Mr. Ma'ayan has held the position of Director, CEO, President or Vice President for several organizations of his own inception. We have been unable to discover his claims of corporate leadership for additional worldwide organizations: his compensation for his participation; any person to describe the level of success or failure that these companies attained during their association with Mr. Ma'ayan; or any contact persons at these organizations. My client has been unable to uncover concrete examples of his alleged successful roles as a corporate officer or Director.

We believe that deceit in one part of life -- his military record -- has carried over and decisively influenced the Ma'ayan/Cutler/Ulberg relationship, resulting in mistrust and misrepresentation, and has had a serious negative impact on the decision process of key business decisions. We have been unable to demonstrate the veracity of many of his claims or his business experience. My client genuinely believes that Mr. Ma'ayan has misled and lied to Mr. Cutler and Ms. Ulberg and that his admitted, deliberate, and comprehensive lying and intentional misrepresentations regarding his military experience are not compartmentalized.

The reason that Casablanca entered any relationship with Mr. Ma'ayan is because it did not have the capital to continue business. As of April, 1995, it was $20,000.00 in debt.

Casablanca Enterprises International, Ltd., while under the leadership of CEO Ari Ma'ayan, has now accumulated debts totaling $556,600.00 (up to Jan. 3, 1996). The breakdown of these debts is as follows:

$437,000	2X payback on bridge financing
$ 30,000	approx. $ for back payroll taxes
$ 6,000	approx. $ for phone/copier leases
$ 7,000	lease on office
$ 43,000	Visa and AMEX bills
$ 34,600	Loans from Ben Ezra, Weinstein & Co.

As Mr. Ma'ayan is aware, Casablanca Enterprises International, Ltd. has no money to repay these debts. It is my client's belief that, if the financial load of this debt were shared equally, each of the principals would be responsible for $185,347.80. As you know, Mr. Ma'ayan was CEO and Chairman of the Board. And, of course, AT&T has a first priority on all assets. If Mr. Ma'ayan sues on his note to secure the stock of CEI, Ltd., he needs to recognize the obvious: If Casablanca, Inc. goes under, there will be no money for anyone.

The only hope is for some returns through Casablanca, Inc. stock. The officers and directors of the company have agreed to proceed with fund raising efforts with the involvement of Ben Ezra, Weinstein and Company. And, in an effort to cooperate with all stockholders, Mr. Cutler, Ms. Ulberg and Ben Ezra, Weinstein and Company would agree, as part of an overall resolution with your client, to waive their claims for their respective loans. While these persons or entities have no obligation to waive these debts, they view this offer as a substantial compromise and look forward to a positive response.

Spence, we are out of witnesses that we can contact to confirm the comprehensive statements Mr. Ma'ayan has made about himself in the business plan. We are convinced that we and other investors have been defrauded. On the other hand, if Mr. Ma'ayan has the information about his background that we have, in our due diligence, sought to secure in support of his representations, we would be pleased to review his supporting documents. If we are mistaken, we would be eager to reconsider our position about Mr. Ma'ayan.

As to your "counterproposal," we must reject it because it is one we cannot accept. If Ben Ezra, Weinstein and Company, or someone else wishes to take an assignment of the promissory note and Mr. Ma'ayan's stock, for whatever amount,

that is between Mr. Ma'ayan and the designees. But for this company to succeed, all parties must waive CEI Ltd.'s debts and obligations.

I have passed on to Casablanca your request that it preserve and protect any and all corporate records for CEI, Ltd., and Casablanca, Inc., including but not limited to corporate minutes, and all records of Expenditures and reports. I have also expressed to Casablanca your concern that there may be an effort to sever Casablanca, Inc. from CEI, Ltd. While I have informed you that no such effort is under way, and while I am not, as counsel, doing any work for Casablanca to sever the holding company from the subsidiary, you should not rely upon this representation beyond its narrow scope and this date.

We hope that Mr. Ma'ayan takes this offer in the cooperative spirit in which it is extended. This matter should be settled amicably and professionally, without an expensive, lengthy, and essentially destructive storm of litigation for all parties involved. Moreover, we need an expeditious settlement. My client views this offer as a substantial compromise and looks forward to a positive response no later than February 20, 1996.

Best regards.

Sincerely yours,

BROWNING & PFEIFER, P.A.

By: James. O. Browning

Enclosures (a/s)

BN 03/12 Ben Ezra Weinstein Sues AOL Over Mistaken Information (Update1)

Ben Ezra Weinstein Sues AOL Over Mistaken Information (Update1)

(Adds quotes from Ben Ezra in third paragraph and AOL in fifth paragraph. Adds companies' stock price in last paragraph.)

Albuquerque, New Mexico, March 12 (Bloomberg) -- Ben Ezra Weinstein and Co. said it sued America Online Inc. for reporting inaccurate stock prices on its network.

The Albuquerque, New Mexico-based company said AOL did nothing for weeks to correct a software error that showed its stock price at one-tenth its true value, while multiplying the number of shares traded, even after repeated phone calls.

''Although AOL now claims that it was not previously aware that there was a problem, Ben Ezra Weinstein has a transcript of a recorded telephone message left by a key AOL employee who admitted AOL had been aware of the problem for several weeks and that AOL determined it was a software malfunction affecting some over-the-counter stocks,'' Michael Weinstein, Ben Ezra's chief operating officer, said in a news release.

Dulles, Virginia-based America Online said the error was corrected as soon as the company was notified and that the case is a publicity stunt.

''We can't see how this company was injured,'' said Wendy Goldberg, spokeswoman for AOL. ''This has a lot more to do with a small company trying to get free publicity.''

AOL said that the error stemmed from its data provider, Standard and Poor's Comstock.

''This is something S&P had to fix,'' Goldberg said. ''We can't monitor everything.''

Standard and Poor's Comstock said none of its other customers were affected by the software bug and that it is investigating the situation.

Ben Ezra Weinstein , which sells software that helps companies make electronic regulatory filings, is seeking undisclosed damages.

AOL's shares fell 1 3/8 to 44 5/8 in afternoon trading, while Ben Ezra Weinstein shares fell 1/8 to 1 3/4.

-- Miriam Kreinin in the New York newsroom (212) 318-2300/js

Story illustration: For a graph of America Online's shares, type: AOL <Equity> GP.

Company news:
BNEZ <Equity> CN Ben Ezra
AOL <Equity> CN America Online

Industry news:
NI LAW Law
NI COS Companies
NI HWY Internet
NI SCR Securities

Regional News:
NI NM New Mexico

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For Immediate Release

AOL SHIRKS RESPONSIBILITY IN COMMUNICATING INFORMATION, SAYS ALBUQUERQUE COMPANY SUING AOL FOR MISQUOTES

ALBUQUERQUE, NM, March 13 -- Ben Ezra Weinstein & Co. (OTC:BNEZ) said that AOL's accusation that Ben Ezra's lawsuit is a publicity stunt demonstrates how little AOL understands its responsibility to deliver accurate stock information. Nor does it appreciate the havoc that it can cause when it misunderstands the public trust inherent in taking on what is essentially the role of a media company, according to the suit.

"It's bad enough that AOL failed to correct a mistake it knew about; what's worse is that, unlike the traditional media, it does not appear to understand that as a conveyor of information, it can cause serious damage and it must correct misinformation immediately," said Jack Ben Ezra, president of Ben Ezra Weinstein.

Ben Ezra said that he was "astonished" by AOL's accusation, adding, "Obviously, this is another example of people in the computer world who are so isolated and/or ignorant that they are unable to understand the ramifications of what they have wrought. This is journalism without the responsibility of journalism."

The suit stems from AOL's reporting wrong quotations of Ben Ezra's stock price and share volume for two days last week. AOL quoted prices that were sharply lower than the real price and volume that was much higher. Ben Ezra noted that the misinformation led to grave confusion in the marketplace and precipitous drops in the actual price of Ben Ezra stock, causing damage to the company's shareholders and the company itself.

In contention is how long AOL knew about its error before it was corrected. AOL claims it acted immediately on finding out about the problem. However, a recorded message from an AOL executive left on the answering machine of Michael Weinstein, BNEZ's chief operating officer, acknowledged that AOL had known about the software problem that caused the misquotes for "a few weeks."

"AOL states that people shouldn't make decisions based on the information they find on AOL pages. This is akin to Ben Ezra Weinstein selling a piece of software with a sticker on it saying, 'This may not work,'" Ben Ezra said.

-more-

"The issue here is not publicity, it is accountability," he continued. "AOL should take guidance from its own latest commercial, which promises accurate information. It might give them a good sense of how to behave in this situation."

America Online stock was down one and three quarters points at Wednesday's closing.

Ben Ezra Weinstein develops and markets an innovative Internet-compatible program which assists companies in the procedure of filing public or private offerings, eliminating up to 85 percent of the cost associated with a traditional Wall Street or venture capital based offering. Marketed under the name CapScape (with a toll free sales and marketing phone number of 888-VCGOAWAY), the program consists of a multimedia software package and optional Internet-based advisory service which makes it possible to complete 85 percent of a Regulation A filing with the Securities and Exchange Commission as well as to complete similar portions of related public and private offerings.

CONTACTS:

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Jack Ben Ezra, CEO
Ben Ezra, Weinstein and Company, Inc.
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www.capscape.com

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Investor Contact:
Jeffrey Volk/Keith L. Lippert
Lippert/Heilshorn & Assoc., Inc.
212-838-3777
jeffrey@lhai.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN AND COMPANY, INC.

Plaintiff,

v.

NO. CIV 97-0485 LH/LFG

AMERICA ONLINE INCORPORATED,

Defendant.

AFFIDAVIT OF MICHAEL L. WEINSTEIN

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

I, Michael L. Weinstein, being duly sworn under oath, state as follows:

1. I am over the age of eighteen (18) years and give the facts stated in this affidavit of my own personal knowledge. If called upon to do so, I could and would competently testify to the matters set forth in this affidavit.

2. I am chief operating officer of Ben Ezra, Weinstein and Company, Inc., ("BEW") the Plaintiff in the above-captioned and numbered litigation. The chief executive officer, Jack Ben Ezra ("Ben Ezra"), and I (together, "we" or "us") are the two principals of BEW. BEW is an Albuquerque-based company that manufactures and markets corporate finance software products and provides technical Internet consultation for clients who would like to attempt to conduct corporate financing over the World Wide Web.

3. Around October 1995, BEW was approached by the principals of two

Exhibit 2

corporations, Casablanca, Inc. and Casablanca Enterprises International, Ltd., Inc. (together, "Casablanca"). The principals, Ari Ma'ayan ("Ma'ayan"), Joel Cutler ("Cutler") and Mary Ulberg ("Ulberg"), sought BEW's assistance in advising them regarding technology and techniques available for assisting them in raising capital for Casablanca.

4. Ma'ayan represented to us that he had a distinguished military, business, academic and philanthropic record, as well as the fact that he was a courageous cancer survivor, and that he had taken out a mortgage on his home so that he could directly invest $200,000.00 in Casablanca.

5. Based upon these and other representations by Ma'ayan, and at Ma'ayan's specific request, BEW informally communicated to several potential investors the fact that Casablanca was currently conducting a bridge financing as a preparatory step to an anticipated, subsequent, Internet financing for which BEW would be providing technical Internet consulting to Casablanca. BEW's technical Internet consulting did not include legal/corporate finance, financial printing or accounting services which were to be separately contracted and paid for by Casablanca as necessary predicates to their attempted Internet financing. Through the private fund-raising efforts of the principals at Casablanca, approximately $100,000.00 in capital was raised from these several investors. At no time did BEW request, or receive, any compensation for the aforementioned informal assistance to Ma'ayan's request for help.

6. However, Casablanca soon ran into financial trouble and needed more money to meet its payroll in late 1995.

7. The principals at Casablanca asked BEW's help to assist them in identifying

more potential investors, but by that time we had become suspicious about some of the representations Ma'ayan had made to us and others about his personal, professional and academic background and the business operations at Casablanca.

8. After some investigation in December 1995, we discovered that Ma'ayan had made numerous false statements about his personal background, including his military service record, and about the operation of Casablanca.

9. In the presence of Casablanca's two other principals, Cutler and Ulberg, Ben Ezra and I confronted Ma'ayan on January 3, 1996, with the results of our investigation into his background. Ma'ayan immediately resigned as chief executive officer of Casablanca.

10. In February 1996, Cutler and Ulberg notified us that Ma'ayan was threatening to sue them and Casablanca to recover an alleged unpaid debt of $200,000.00, which Ma'ayan had represented to BEW as the investment from his mortgage loan.

11. I believe that Ma'ayan's litigation threats were, among other things, an attempt to sabotage any attempt to free Casablanca from its then current financial bind.

12. Cutler and Ulberg specifically asked us to find legal counsel to advise them regarding Ma'ayan's threatened legal action.

13. After interviewing several attorneys, we contacted James O. Browning ("Browning"), a named partner in the Albuquerque law firm of Browning & Peifer, P.A. Ben Ezra had been given Browning's name by a friend.

14. During the course of a telephone conversation with Browning in February

1996 to determine if he was "right" for this legal matter, Ben Ezra and I went into extreme detail about the nature of BEW, its business history, strategies and financial situation, its role in the matter for which Browning had been contacted, as well as related and extremely confidential information.

15. Ben Ezra and I wanted to be very careful about the attorney who would represent Cutler, Ulberg and Casablanca because we believed that Ma'ayan would file the same or related litigation against us or BEW at any time. As a result, we needed the attorney we selected also to provide legal representation for us in defense of the anticipated lawsuit.

16. I repeatedly advised Browning that I fully expected that Ben Ezra, myself and BEW would be named as defendants in any litigation filed by Ma'ayan. Browning never told us that he would not be able to represent us or BEW in litigation with Ma'ayan.

17. I went to the offices of Browning & Peifer, P.A. with Cutler and Ulberg in February 1996 to meet and strategize with Browning in person.

18. During this meeting attended by Browning, Cutler, Ulberg and myself at Browning's law offices, Browning asked me to leave the room once or twice to allow him to consult with Cutler and Ulberg alone. Browning led me to believe that he wanted to talk with Cutler and Ulberg alone only to assure himself that they did not have adverse interests to me, Ben Ezra or BEW that would prevent him from working closely with me, Ben Ezra and BEW in the potential litigation against all of us by Ma'ayan.

19. On several occasions Ben Ezra and I discussed with Browning the benefits

and drawbacks to filing a preemptive lawsuit against Ma'ayan as part of our overall strategy in defending Cutler, Ulberg and Casablanca from the litigation threats.

20. During the course of Browning's representation, I had several extensive conversations with him about the history of our dealings with Casablanca and its principals. I disclosed to Browning specifics about BEW's financial status, its corporate history and strategies, extremely sensitive and confidential personal matters about Ben Ezra and myself, as well as possible areas of concern in any litigation that would result.

21. I also discussed with Browning BEW's litigation strategies and how we wanted him to handle particular legal situations that could or did arise. BEW directed Browning's representation with the consent of Cutler and Ulberg.

22. During Browning's representation, he told me that he was confused about the identity of his client.

23. I also made it clear to Browning that in the event of any lawsuit by Ma'ayan, I expected him to represent me, BEW, and Ben Ezra.

24. During the course of his representation, Browning freely consulted with me or Ben Ezra about how to proceed in response to various situations that arose. Drafts of correspondence were sent to BEW by Browning or with Browning's knowledge and approval for our review and comments.

25. I believed that our discussions were protected from disclosure by the attorney-client privilege. Browning never advised us that we were not his clients and that he would not be able to represent us in a common defense in the anticipated litigation with Ma'ayan.

26. In a letter dated February 15, 1996, to the attorney representing Ma'ayan, Browning made representations on behalf of BEW, as well as on behalf of Casablanca. A true and correct copy of this letter is attached as "**Exhibit 2**" to the Affidavit of Jack Ben Ezra filed concurrently herewith.

27. I believed that I, Ben Ezra and BEW were Browning's clients. I disclosed to him highly sensitive information about BEW's financial condition, the way it would handle particular litigation situations, and other confidential and proprietary information.

28. In addition, Ben Ezra and I disclosed to Browning confidential information regarding our personal and professional lives and litigation strategies.

29. Ben Ezra and BEW paid all fees for Browning's legal representation in the amount of $6,524.87.

30. I believe that Browning already has disclosed or will disclose much of the financial information, litigation strategies and other highly confidential information that he obtained from me, Ben Ezra and BEW to Defendant America Online, Inc. and/or its counsel and use it to the detriment of BEW in the pending litigation.

31. I am an attorney, but am not licensed to practice law in the State of New Mexico. I informed Browning that I would not be acting in the capacity of an attorney in the Ma'ayan matter, and that I was unfamiliar with New Mexico laws. I told Browning that I would look to him for comprehensive, strategic and tactical advice regarding specific New Mexico law relevant to the assertions being alleged by Ma'ayan, and that I would share with Browning my personal litigation strategies and tactics. I agreed with Browning that Browning would have the final say in all matters.

32. A draft of a letter by Browning that I modified, and which modifications were incorporated *in toto* by Browning in a February 15, 1996, letter to Spencer Reid, is attached hereto as **Exhibit "1"**.

33. On April 10, 1997, the day this litigation was removed to federal court, we discovered for the first time that Browning had been retained by AOL as local counsel. Ben Ezra, BEW and I immediately directed our former counsel in this matter, the Rodey Law Firm, to ask Browning and Browning & Peifer, P.A. to withdraw from the representation. In a telephone conversation the next day, Rex Throckmorton of the Rodey Law Firm asked Browning to withdraw. Browning refused. This verbal request was followed by written request by Mr. Mullins on April 14, 1997. See copy of letter from Joseph J. Mullins to Browning dated April 14, 1997, attached hereto as **Exhibit "2"**.

34. After March 1996, Cutler's spouse and Ulberg sent separate communications to Ben Ezra expressing their hostility for how the situation was handled. Based upon his past relationship with Cutler and Ulberg, Browning could obtain information adverse to BEW from Cutler and Ulberg.

35. I believe that if Browning uses the confidential information regarding BEW, Ben Ezra or myself or discloses that information to AOL's in-house and national counsel, BEW's position in this litigation will be irreparably harmed.

36. I do not believe it will be possible to determine the harm to BEW resulting from the use or disclosure of the confidential information that BEW communicated to Browning.

FURTHER AFFIANT SAYETH NAUGHT.

Michael L. Weinstein

ACKNOWLEDGED AND SWORN TO before me on May 6th, 1997, by Michael L. Weinstein.

My commission expires 4/2000.

NOTARY PUBLIC

OFFICIAL SEAL
Cristya Abrams
NOTARY PUBLIC
STATE OF NEW MEXICO
My Commission Expires: 4/2000

BROWNING & PEIFER, P.A.
ATTORNEYS AND COUNSELORS AT LAW
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CHARLES R. PEIFER
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WILLIAM "BO" FRAZIER
RAYMOND G. KUNTZ

FACSIMILE
(505) 243-6458

February 15, 1996

DRAFT

Mr. Spencer Reid
Keleher & McLeod, P.A.
414 Silver Ave. S.W.
P.O. Drawer AA
Albuquerque, NM 87102

RE: Ma'ayan v. Casablanca F.I. Ltd.

Feb 15th

Dear Spence:

I too appreciated the opportunity to talk to you on February 8, 1996, and your letters of February 9th. We appreciate your interest in trying to resolve this matter without litigation. As we discussed at our meeting, there is no scenario involving litigation or bankruptcy that benefits anyone.

You misunderstood our comments about Mr. Ma'ayan's misrepresentation and prevarications regarding his military experience. Neither our purpose nor intent is to embarrass Mr. Ma'ayan. But we all know that Mr. Ma'ayan passed himself off as a high ranking, highly decorated Vietnam veteran, with many stories of what went on "back in 'Nam." Mr. Cutler and others confronted Mr. Ma'ayan about this and other lying on or about January 3, 1996, and Mr. Ma'ayan admitted that he was a pathological liar; that he had never been in Vietnam; and that he was so very ashamed that he had lied to Mr. Cutler and Ms. Ulberg. Incredibly, just one week later, in front of Mr. Cutler, Mr. Ma'ayan was again talking about being "back in 'Nam," describing his encounters with mortar shells, bunkers, and, in general, the war.

I assume that the reason you think our discussion of Mr. Ma'ayan's lying about his military record is irrelevant and merely an attempt to embarrass Mr. Ma'ayan is because of your mistaken assumption that Mr. Cutler and Ms. Ulberg did not rely on Mr. Ma'ayan's proclaimed military background. In addition, on Mr. Ma'ayan's representations to being

directly to Mr. Cutler and Ms. Ulberg about his military experience and career. Mr. Cutler and Ms. Ulberg relied upon his representations about his highly decorated combat experience as indicative of his general leadership ability and qualifications. Casablanca chose Mr. Ma'ayan because of his leadership experience. Indeed, Casablanca would not have been involved with Mr. Ma'ayan in the business or in the loan but for Mr. Ma'ayan's lies about his leadership abilities. And that is the precise result and effect Mr. Ma'ayan intended to have with his lying. The very definition of "pathological liar" includes that there is a "pathology" to the lying.

You also know that, under the law of evidence, Mr. Ma'ayan's lying about his military record is not immaterial to the issues about the promissory note. We do intend to show the Court that, on the majority of pertinent matters, Mr. Ma'ayan does not tell the truth. We believe that we will convince the Court that Mr. Ma'ayan is, as he has admitted, a pathological liar, and that his testimony on the issues, including those that have a direct bearing on his stated abilities, strengths and leadership experience as a corporate manager, were seriously embellished and misrepresented.

Please find attached copies of pages 9 and 10 of CEI Ltd's business plan. Mr. Ma'ayan personally authored and approved its publication for prospective stockholder consumption. It was this business plan that was provided, among others, to those individuals who invested in the CEI Ltd. bridge financing. Based on the same information provided by Mr. Ma'ayan, Mr. Cutler and Ms. Ulberg felt secure in their knowledge that CEI Ltd. was being well managed by an individual of Mr. Ma'ayan's business and professional experience and related stature.

We have reason to believe, through our continuing due diligence ~~diligent~~ investigations, that we will be able to demonstrate, by objective criteria, that pertinent points of Mr. Ma'ayan's business and professional history are materially untrue and inaccurate. While Mr. Ma'ayan suggests that his lying is a problem of the past, and isolated, his biography as published in the business plan was written by him less than a year ago. Specifically, the following statements and representations of his business and professional experience, as personally detailed in the CEI Ltd. business plan by Mr. Ma'ayan, appear to be grossly overstated and unfounded, or at least cannot be confirmed as to accuracy and truthfulness:

1. "Ari Ma'ayan is a seasoned executive with over 25

years of management. We no longer believe that Mr. Ma'ayan has 25 years of management experience. We have been unable to date to discover names and addresses of most of these companies, or Mr. Ma'ayan's job titles, duties and salary compensation. Indeed, we have been unable to discover contact persons at ~~each~~ previous employer or client. We have been unable to put this management experience in a time line. We believe that the evidence will show that, while Mr. Ma'ayan might have been in some capacity of management, we find no concrete examples of either stated successes or demonstrated skills supporting his published claims. We believe that the evidence will show that there were substantially less management aspects to many of Mr. Ma'ayan's prior positions and that there are extremely few, if any, concrete examples of successes.

2. "Ma'ayan is an expert at improving business operations as evidenced by his ability to acquire a British organization which was operating at a 120,000 pound/month deficit and turn it into a 120,000 pound/month net profit operation within six months." We have been unable to discover: (i) the name of this company; (ii) detailed information about Mr. Ma'ayan's role; or (iii) the title or titles held by Mr. Ma'ayan during the six months he cites. Most importantly, we have been unable to discover the names of officers at the company who can verify Mr. Ma'ayan's claim that the primary responsibility for the turnaround is his.

3. "Currently Ma'ayan is President and COO of Sandia Strategic Services Inc. a management consulting firm in Albuquerque, NM. In this and other consulting positions he has guided and assisted over 120 companies and government laboratories, accumulating over 20 years experience in the business consulting field." We have not been able to compile a list of "over 120 companies and government laboratories," as cited by Mr. Ma'ayan, nor have we been able to compile dates, compensation, contact names, or the duties and responsibilities of Mr. Ma'ayan that demonstrate the extent of Mr. Ma'ayan's "guidance and assistance." We have also been unable to develop any timeline format. Because we have been unable to specify the companies and institutions that Mr. Ma'ayan has worked with, we no longer believe that he has accumulated "20 years" of experience in the business consulting field. In addition, we have been unable to compile a list of clients, contact names, or compensation history for Mr. Ma'ayan during his tenure at Sandia Strategic Services. For example, not only have we been unable to list the names of companies for which Mr. Ma'ayan secured significant (in excess of $100,000)

funding, we have been unable to detect that Mr. Ma'ayan brought public or increased bottom line efficiency for other companies. We especially have not been able to detect definitive successes in his consulting history in regard to his published claims.

4. "This experience has made Mr. Ma'ayan an expert in venture capitalization, strategic planning, product development, future forecasting, market development, OEM agreements, corporate partnering, technology transfer, process development and facilities development and management." We have been unable to discover any details of the precise situational experiences under which Mr. Ma'ayan became an "expert" in all of the cited areas. We have been unable to learn college or graduate degrees, membership in learned or professional organizations or any papers published that would tend to fairly and accurately qualify Mr. Ma'ayan as an "expert" in each of the ten fields listed by him.

5. Mr. Ma'ayan states that he has held the "position of Director, CEO, President or Vice President for six organizations worldwide." We acknowledge that Mr. Ma'ayan has held the position of Director, CEO, President or Vice President for several organizations of his own inception. We have been unable to discover his claims of additional worldwide organizations; his compensation for his participation; any person to describe the level of success or failure that these companies attained during their association with Mr. Ma'ayan; or any contact persons at these organizations. My client has been unable to uncover concrete examples of his roles as a corporate officer or Director.

We believe that deceit in one part of life -- his military record -- has carried over and decisively influenced the Ma'ayan/Cutler/Ulberg relationship, resulting in mistrust and misrepresentation, and has had a serious negative impact on the decision process of key business decisions. We have been unable to demonstrate the veracity of many of his claims or his business experience. My client genuinely believes that Mr. Ma'ayan has misled and lied to Mr. Cutler and Ms. Ulberg and that his admitted, deliberate, and comprehensive lying and intentional misrepresentations regarding his military experience are not compartmentalized.

The reason that Casablanca entered any relationship with Mr. Ma'ayan is because it did not have the capital to continue business. As of April, 1995, it was $20,000.00 in debt. Casablanca Enterprises International, Ltd., while under the

leadership of CEO Ari Ma'ayan, has now accumulated debts totaling $556,600.00 (up to Jan. 3, 1996). The breakdown of these debts is as follows:

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As Mr. Ma'ayan is aware, Casablanca Enterprises International, Ltd. has no money to repay these debts. It is my client's belief that, if the financial load of this debt were shared equally, each of the principals would be responsible for $185,347.80. As you know, Mr. Ma'ayan was CEO and Chairman of the Board. And, of course, AT&T has a first priority on all assets. If Mr. Ma'ayan sues on his note to secure the stock of CEI, Ltd., he needs to recognize the obvious: If Casablanca, Inc. goes under, there will be no money for anyone.

The only hope is for some returns through Casablanca, Inc. stock. The officers and directors of the company have agreed to proceed with fund raising efforts with the involvement of Ben Ezra/Weinstein & Co. And, in an effort to cooperate with all stockholders, Mr. Cutler, Mr. Ulberg and Ben Ezra/Weinstein & Co. would agree, as part of an overall resolution with your client, to waive their claims for their loans. While these persons have no obligation to waive these debts, they view this offer as a substantial compromise and look forward to a positive response.

Spence, we are out of witnesses that we can contact to confirm the comprehensive statements Mr. Ma'ayan has made about himself in the business plan. We are convinced that we and other investors have been defrauded. On the other hand, if Mr. Ma'ayan has the information about his background that we have, in our due diligence, sought to secure in support of his representations, we would be pleased to review his supporting documents. If we are mistaken, we would be eager to reconsider our position about Mr. Ma'ayan.

As to your "counterproposal," we must reject it because it is one we cannot accept. If Ben Ezra, Weinstein or someone else wishes to take an assignment of the promissory note and Mr. Ma'ayan's stock, for whatever amount, that is between Mr. Ma'ayan and the designees. But for this company to succeed, all parties must waive CEI Ltd.'s debts and obligations.

I will have Cutler sign

As to stock certificates for stock purchased pursuant to the 27K exemption, Mr. Cutler will promptly issue these to you. We agree with you that you need not offer up your stock in the company for the repayment of the promissory note.

I have passed on to Casablanca your request that it preserve and protect any and all corporate records for CEI, Ltd., and Casablanca, Inc., including but not limited to corporate minutes, and all records of Expenditures and reports. I have also expressed to Casablanca your concern that there may be an effort to sever Casablanca, Inc. from CEI, Ltd. While I have informed you that no such effort is under way, and while I am not, as counsel, doing any work for Casablanca to sever the holding company from the subsidiary, you should not rely upon this representation beyond its narrow scope and this date.

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Best regards.

Sincerely yours,

BROWNING & PEIFER, P.A.

By:
James. O. Browning

Enclosures (a/s)

JOHN O. ROOD
JAMES C. RITCHIE
ROBERT M. ST. JOHN
JOSEPH J. MULLINS
MARK K. ADAMS
ROBERT G. McCORKLE
BRUCE HALL
JOHN P. SALAZAR
WILLIAM S. DIXON
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WRITER'S DIRECT NUMBER

April 14, 1997

VIA TELEFACSIMILE (243-6458)
James O. Browning, Esq.
Browning & Peifer, P.A.
P.O. Box 25245
Albuquerque, NM 87125-5245

RE: Ben Ezra Weinstein v. AOL

Dear Jim:

I am sorry I was in conference when you dropped by Thursday afternoon. If I had known you were coming, I would have tried to reschedule things.

I worked with you and Chuck for so many years, and my daughter, Cerianne, worked for you during law school, so it will be quite a change to be opposed to you. However, as you know, our principals feel strongly that your firm is disqualified from taking adverse representation in this case. I understand Rex Throckmorton has talked to you about their concerns which arise out of your recent representation of their colleagues which involved many hours of strategy planning, document drafting, and many other related interfaces between you and my principals in your office. I further understand that you were quite aware that our principals actually paid your fees in that representation about a year ago. As lawyers, we are getting such a bum rap these days, I know you will be sensitive to their feelings that your representation and your contacts with them are too closely related to the nature of this lawsuit to be appropriate.

Rex asked me to tell you that Catherine Goldberg is undertaking research on the issue of your disqualification, and we'll be back in touch with you if you do not voluntarily decide to give up this case. If you are really acting only as "a drop box," as you advised Rex you really shouldn't mind.

In the meantime, my secretary understood you to make a couple of requests of me in relation to your representation in this case. Without waiving our strong objection to your representation, I respond as follows:

1. First, you have asked for a 32-day extension in which to plead in response to our complaint. Of course, I will acquiesce in your request, just as I know you will reciprocate. In fact, let us just consider that you are giving me a reservoir of 32 days which I may apply, as needed, to various deadlines that I will incur in the continued handling of this case. I also request that you obtain an Order allowing your requested extension, as I believe it is beyond that which would normally be approved by the Court, and we want to keep the court apprised on the record of such a lengthy extension. It might not give you the benefits you seek, if the Court proceeds with its usual alacrity to set Scheduling Orders, etc. Just send over your order for me to indicate my consent.

2. With regard to your request that we withdraw our Request for Production, Interrogatories, and Request for Admissions, I advise as follows:

a. If you will consider the Request for Production as at least the minimal of your Rule 26 Initial Disclosures of Documents, I have no problem with your request.

b. With regard to our Interrogatories, I see no reason to re-publish them, but I am willing to agree that you may consider them served as of the date we "meet and confer" pursuant to Rule 26(f).

c. Likewise, as to our Request for Admissions.

I trust this takes care of your concern about our outstanding discovery.

By the way, Jim, I propose that we limit required service to your firm and my firm, and then we can, as we see fit, take the responsibility for passing pleadings on to our co-counsel (and in your case, additionally house counsel).

Again, Jim, Rex (as well as the rest of those in the office who heard about this) have great confidence you will do the right thing and voluntarily withdraw.

Very truly yours,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: 
Joseph J. Mullins

JJM:br
cc: Paul Kennedy, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN, AND
COMPANY, INC.

Plaintiff,

vs. NO. CIV 97-0485 LH/LFG

AMERICA ONLINE, INC.

Defendant.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL FOR DEFENDANT AMERICA ONLINE, INC.

I. INTRODUCTION

Plaintiff Ben Ezra, Weinstein, and Company, Inc., (BEW) submits this Memorandum in support of its Motion to Disqualify Counsel for Defendant America Online, Inc. (AOL). BEW seeks to disqualify James O. Browning, Browning & Peifer, P.A. (B & P), AOL's local counsel. BEW also seeks to disqualify AOL's in-house counsel, Randall J. Boe and Elizabeth deGarzia Blumenfeld, AOL's entire in-house legal staff, and AOL's national counsel, Wilmer, Cutler & Pickering (collectively Wilmer). As grounds for its Motion, BEW states that B&P previously represented BEW, confidential information was communicated to B & P, and the present litigation involves a matter that is substantially related to the prior representation. B & P therefore must be disqualified from representing AOL in the pending litigation. Furthermore, B & P's disqualification should be imputed to AOL's in-house counsel and

national counsel because they are currently associating with B & P in this action. BEW therefore respectfully requests that the Court grant its Motion to Disqualify.

II. STATEMENT OF FACTS

1. BEW is an Albuquerque based company that manufactures and markets corporate finance software products and provides technical Internet consultation for clients who would like to attempt to conduct corporate financing over the World Wide Web. Jack Ben Ezra (Ben Ezra) is the chief executive officer and Michael L. Weinstein (Weinstein) is the chief operating officer of BEW. Ben Ezra Aff. ¶2; Weinstein Aff. ¶2, attached as Exhibits to BEW's Memorandum in Support of Application for Temporary Restraining Order and Preliminary and Permanent Injunction.

2. Ari Ma'ayan (Ma'ayan), Joel Cutler (Cutler), and Mary Ulberg (Ulberg), were the principals of two corporations, Casablanca, Inc. and Casablanca Enterprises International, Ltd., Inc. (collectively Casablanca). In approximately October 1995, Ma'ayan, Cutler, and Ulberg sought BEW's assistance in advising them regarding technology and techniques available for assisting them in raising capital for Casablanca. Ben Ezra Aff. ¶3; Weinstein Aff. ¶3.

3. Ma'ayan made numerous representations regarding his personal, professional and academic background to BEW, including that he had taken out a mortgage on his home so that he could directly invest $200,000 in Casablanca. Ben Ezra Aff. ¶4; Weinstein Aff. ¶4.

4. Based upon these and other representations by Ma'ayan, and at Ma'ayan's specific request, BEW informally communicated to several potential

investors the fact that Casablanca was currently conducting a bridge financing as a preparatory step to an anticipated, subsequent, Internet financing for which BEW would be providing technical Internet consulting to Casablanca. BEW's technical Internet consulting did not include legal/corporate finance, financial printing or accounting services which were to be separately contracted and paid for by Casablanca as necessary predicates to their attempted Internet financing. Through the private fundraising efforts of the principals at Casablanca, approximately $100,000.00 in capital was raised from these several investors. At no time did BEW request, or receive, any compensation for the aforementioned informal assistance to Ma'ayan's request for help. Ben Ezra Aff. ¶ 5, Weinstein Aff. ¶ 5.

5. Casablanca ran into financial trouble and needed more money to meet its payroll in late 1995. Pursuant to Casablanca's emergency requests, Ben Ezra personally loaned Casablanca approximately $36,000 during the last four months of its existence in a last ditch effort to enable it to meet its day-to-day expenses long enough to re-structure its operations within a workable cash-flow budget. Ben Ezra Aff. ¶6; Weinstein Aff. ¶6.

6. The Casablanca principals asked for BEW's assistance to identify more potential investors. Ben Ezra and Weinstein had become suspicious regarding Ma'ayan's representations about his personal background and the business operations at Casablanca. After some investigation in December 1995, they discovered that Ma'ayan had made numerous false statements. Ben Ezra Aff. ¶¶7, 8; Weinstein Aff. ¶¶7, 8.

7. On January 3, 1996, Weinstein and Ben Ezra confronted Ma'ayan with the results of the investigation in front of Cutler and Ulberg; Ma'ayan immediately resigned as chief executive officer of Casablanca. Ben Ezra Aff. ¶9; Weinstein Aff. ¶9.

8. In February 1996, Cutler and Ulberg notified BEW that Ma'ayan was threatening to sue them and Casablanca to recover an alleged unpaid debt of $200,000; this $200,000 was the same $200,000 which Ma'ayan had represented to BEW as the investment from his mortgage loan. *See* ¶3, *supra.* At the same time, Ma'ayan threatened Ben Ezra. Ben Ezra Aff. ¶¶10, 11; Weinstein Aff. ¶¶10, 11.

9. Cutler and Ulberg asked BEW to find legal counsel to advise them regarding Ma'ayan's threatened legal action. Ben Ezra contacted James O. Browning (Browning). In a February 1996 telephone conversation, Ben Ezra and Weinstein told Browning the facts underlying Ma'ayan's threatened litigation and BEW's role in Ma'ayan's resignation from Casablanca. Ben Ezra Aff. ¶¶12-15. While interviewing Browning, Weinstein and Ben Ezra went into extreme detail about the nature of BEW, its business history, strategies, its financial situation, as well as related and extremely confidential personal and professional information. Weinstein Aff. ¶¶12-14.

10. Ben Ezra told Browning that Ma'ayan's threats against Cutler, Ulberg and Casablanca were an attempt at revenge on BEW, Ben Ezra, and Weinstein and that a strong showing of resolve might deter Ma'ayan from following through on his personal threats against Ben Ezra. Ben Ezra Aff. ¶16.

11. Ben Ezra and Weinstein told Browning that they expected that BEW, Ben Ezra and Weinstein would be named as defendants in any litigation that was filed by

Ma'ayan and they expected Browning to represent them. Ben Ezra Aff. ¶¶18, 28; Weinstein Aff. ¶¶15, 16, 23. Browning never told Ben Ezra and Weinstein that he would not be able to represent them or BEW in litigation against Ma'ayan. Weinstein Aff. ¶25.

12. During the initial interview, Ben Ezra told Browning he or BEW would be responsible for Browning's fees. Ben Ezra Aff. ¶ 17. Ben Ezra subsequently gave Cutler and Ulberg the $5,000.00 retainer requested by Browning. Ben Ezra asked Browning to send the bills to Casablanca with copies to BEW for any additional fees that might be incurred. BEW received from B & P additional bills for $1,524.87, which BEW paid. Ben Ezra Aff. ¶¶17, 20, 21; Weinstein Aff. ¶29.

13. Cutler, Ulberg, and Weinstein attended a meeting with Browning in February 1996. Browning asked Weinstein to leave so he could consult with Cutler and Ulberg alone. Browning led Weinstein to believe he wanted to talk to Cutler and Ulberg alone to assure himself that they did not have adverse interests to BEW, Weinstein or Ben Ezra that would prevent Browning from working closely with them in the threatened litigation. Weinstein Aff. ¶18.

14. Browning, Ben Ezra and Weinstein discussed the possibility of Browning filing declaratory judgment lawsuits on behalf of BEW, Weinstein, and Ben Ezra and/or Casablanca against Ma'ayan. After Ben Ezra disclosed the facts underlying such a lawsuit, Browning responded that he would need a $75,000 retainer. Ben Ezra then disclosed confidential financial information to Browning regarding himself, Weinstein and BEW. Ben Ezra Aff. ¶¶22, 23; Weinstein Aff. ¶19.

15. Ben Ezra and Weinstein had extensive conversations with Browning about the history of BEW's dealings with Casablanca and its principals. They also disclosed specifics about BEW's financial status, its corporate history and strategies, extremely sensitive, confidential and personal information about themselves pertaining to the current matter, as well as possible areas of concern in any litigation that would result. Ben Ezra and Weinstein discussed with Browning BEW's litigation strategies and how BEW wanted Browning to handle particular legal situations that could arise and did arise. Weinstein, an attorney not licensed to practice law in New Mexico, informed Browning that he would not be acting in his capacity as an attorney in the Ma'ayan matter, he was unfamiliar with New Mexico laws, and he would look to Browning for comprehensive, strategic, and tactical advice regarding the assertions being alleged by Ma'ayan. Weinstein offered to share with Browning his personal litigation strategies and tactics, but agreed with Browning that Browning would have the final say in all matters. Ben Ezra Aff. ¶¶24, 25; Weinstein Aff. ¶¶20, 21, 31.

16. Browning told Ben Ezra and Weinstein on several occasions that he was confused about who he would ultimately represent and who exactly was his client. Browning told Ben Ezra he would not represent Cutler, Ulberg or Casablanca in any dispute against Ben Ezra, Weinstein or BEW. Ben Ezra Aff. ¶¶26, 27; Weinstein Aff. ¶22.

17. Subsequent to the Ma'ayan dispute, Cutler's spouse and Ulberg sent separate communications to Ben Ezra expressing their hostility toward Ben Ezra for how the situation was handled. Based on his past relationship with Cutler and Ulberg,

Browning could obtain information adverse to BEW from Cutler and Ulberg. Weinstein Aff. ¶34.

18. Browning freely consulted with Ben Ezra and Weinstein about how to proceed in response to various situations. Browning sent, or personally approved the sending by Culter, Ulberg or Casablanca of drafts of correspondence to BEW for review and comments, which Weinstein or Ben Ezra reviewed and at times revised in direct communication with Browning. Ben Ezra Aff. ¶29; Weinstein Aff. ¶24. A draft of a letter by Browning that Weinstein modified is attached as Exhibit 1 to Weinstein's Affidavit. In addition, Ben Ezra prepared a draft letter on behalf of Ulberg, Cutler and Casablanca for Browning to send to Spencer Reid, the attorney for Ma'ayan. Ben Ezra wrote attorney-client privilege on a draft of this correspondence and he believes he sent it directly to Browning or to Ulberg and Cutler to forward to Browning. A copy of this letter is attached as Exhibit 1 to Ben Ezra's Affidavit. Regardless, Ben Ezra, Weinstein and BEW played a significant role as Browning's clients in the preparation of the final letter dated February 15, 1996. Exhibit 2 to Ben Ezra's Affidavit.

19. In a letter dated February 15, 1996, Browning made the following representation on behalf of BEW to Ma'ayan's attorney:

> The only hope is for some returns through Casablanca, Inc. stock. The officers and directors of the company have agreed to proceed with fund raising efforts **with the involvement of Ben Ezra, Weinstein and Company**. And, in an effort to cooperate with all stockholders, Mr. Cutler, Ms. Ulberg, **and Ben Ezra, Weinstein and Company would agree, as part of an overall resolution with your client, to waive their claims for their respective loans. While these persons or**

> entities have no obligation to waive these debts, they view this offer as a substantial compromise and look forward to a positive response.

Exhibit 2 to the Aff. of Ben Ezra (emphasis added); Ben Ezra Aff. ¶31; Weinstein Aff. ¶26.

20. On April 10, 1997, the day this litigation was removed to Federal Court, BEW, Weinstein, and Ben Ezra discovered for the first time that Browning had been retained by AOL as local counsel. Ben Ezra, BEW, and Weinstein immediately directed their former counsel, the Rodey Law Firm, to ask Browning and Browning & Peifer, P.A. to withdraw. In a telephone conversation the next day, Rex Throckmortan, Esq. of The Rodey Law Firm asked Browning to withdraw. Browning refused. This verbal request was followed by a written request by Mr. Mullins on April 14, 1997. *See* Exhibit 2 to Weinstein's Affidavit. Browning refused to withdraw from representing AOL.

21. Both Ben Ezra and Weinstein believed that Browning was representing them and BEW; they both believed their communications with Browning were protected by the attorney-client privilege; and they both believe their communications will be disclosed to AOL to BEW's detriment in this litigation. Ben Ezra Aff. ¶¶32, 33; Weinstein Aff. ¶¶25, 27, 28, 30.

22. After BEW filed its Complaint To Recover Property Damages, AOL issued a statement to the media claiming that BEW's lawsuit was frivolous and that BEW was suing AOL for publicity. BEW's responding statement set forth the reasons why

it was compelled to bring an action against AOL. *See* Exhibits 3 and 4 to Ben Ezra's Affidavit.

III. B & P MUST BE DISQUALIFIED BECAUSE OF ITS PRIOR REPRESENTATION OF BEW

A. The Standard Applied to Motions to Disqualify

The right to counsel is "secondary in importance to preserving the integrity of the judicial process, maintaining the public confidence in the legal system, and enforcing the ethical standards of professional conduct." *Koch v. Koch Indus.*, 798 F. Supp. 1525, 1530 n.2 (D. Kan. 1992). Although the party moving for disqualification has the burden of showing grounds for disqualification, "[b]ecause the interests to be protected are critical to the judicial system, doubts are resolved in favor of disqualification." *Id.* at 1530-31.

Motions to disqualify are governed by two sources of authority: The rules of professional conduct of the state where the federal court is situated and appropriate standards developed under federal law. *Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373, 1383 (10th Cir. 1994). NMRA 16-109 (1997), provides that a lawyer who has formerly represented a client is prohibited from representing a person in a substantially related matter in which that person's interests are materially adverse to the former client and is prohibited from using information relating to the representation to the disadvantage of the former client. Under this rule, ABA Model Rule 1.9, and case law applying those rules, a court must disqualify counsel on the ground of a former representation if it is established that: "(1) an actual attorney-client relationship existed between the

moving party and the opposing counsel; (2) the present litigation involves a matter that is 'substantially related' to the subject of the movant's prior representation; and (3) the interests of the opposing counsel's present client are materially adverse to the movant." *Cole*, 43 F.3d at 1384. Because BEW establishes these three elements, B & P must be disqualified.[1]

B. There was an Attorney-Client Relationship between BEW and B & P

An attorney-client relationship exists if a party submits confidential information to an attorney with the reasonable belief that the attorney is acting for the party. *Cole*, 43 F.3d at 1384. In this case, the Affidavits of Messrs. Ben Ezra and Weinstein establish that they submitted confidential information to Browning regarding themselves and BEW and, based on their conversations with Browning and his conduct throughout the relationship, they reasonably believed that Browning was acting as their attorney. Accordingly, the Court should find that there was an attorney-client relationship between BEW and B&P.

New Mexico courts have recognized that "[n]o formal contract, arrangement or attorney fee is necessary to create the relationship of attorney and client" and that the relationship may be implied from the conduct of the parties. *George v. Caton*, 93 N.M. 370, 375, 600 P.2d 822, 827 (Ct. App. 1979). Thus, courts look at whether the client believed he could turn to the attorney for the purpose of securing legal advice in confidence; whether the client could have been confused about the lawyer's legal

[1]Since BEW and AOL are adverse parties in this litigation, it cannot be disputed that the third element of the test is met.

position; and whether it would be unfair to allow the lawyer to use the client's communications against him. *Wylie v. Marley Co.*, 891 F.2d 1463, 1471-72 (10th Cir. 1989) (court granted motion in limine excluding conversation between plaintiff and general counsel for defendant corporation).

Similarly, the Restatement (Third) of the Law Governing Lawyers §26 (Proposed Final Draft No. 1, March 29, 1996), states that an attorney-client relationship arises when "(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services...." *See also Bays v. Theran*, 639 N.E.2d 720, 723 (Mass. 1994) (attorney-client relationship may be implied when person seeks advice or assistance from attorney; the advice or assistance pertains to matters within the attorney's professional competence; and the attorney expressly or impliedly agrees to give or actually gives the advice or assistance). Thus, even if an attorney does not communicate a willingness to represent a person, a relationship arises when the person reasonably relies on the attorney to provide legal services and the attorney does not inform that person that he will not do so. Restatement (Third) of the Law Governing Lawyers §26, comment.

For example, in *Nemours Found. v. Gilbane, Aetna, Fed. Ins.*, 632 F. Supp. 418 (D. Del. 1986), plaintiff Nemours moved to disqualify an attorney from representing defendant Pierce because the attorney had previously represented Nemours' co-party,

Furlow, in the same litigation. The court granted the motion, finding that although there was no express attorney-client relationship, an implied relationship existed because Nemours had disclosed information acting on the belief and expectation that the disclosure was made in order for Furlow's law firm to render legal service to him. The court noted the attorney was privy to confidences made during Nemours and Furlow's strategy sessions; there was a commonality of interest that necessitated a sharing of work product, attorney-client privileges, and other confidential information; and it was clear Furlow's interests were adverse to those of Pierce. *Id.* at 422-24.

In a similar manner, the court in *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319-20 (7th Cir.), *cert. denied,* 439 U.S. 955 (1978), granted the defendant's motion to disqualify the plaintiff's counsel, finding that the defendant had reasonably believed it was submitting confidential information to a law firm that was acting in its interest. *Id.* at 1321. The court reasoned that "[t]he professional relationship for purposes of the privilege for attorney-client communications hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional advice." *Id.* at 1319.

As the preceding cases suggest, an attorney-client relationship "may arise solely from the nature of the work performed and the circumstances under which confidential information is disclosed." *Nelson v. Green Builders, Inc.*, 823 F. Supp. 1439, 1445, 1448-49 (E.D. Wis. 1993) (court disqualified law firm). Furthermore, "the law does not require a long-term or complicated attorney/client relationship to fulfill the first prong

of the test for disqualification." *McPartland v. ISI Inv. Serv., Inc.*, 890 F. Supp. 1029, 1031 (M.D. Fla. 1995) (attorney-client relationship existed where plaintiff claimed he repeatedly sought legal advice from attorney and attorney provided advice).

In the present case, the Affidavits of Messrs. Ben Ezra and Weinstein establish that these gentlemen submitted confidential information to Browning and they reasonably believed he was acting as their attorney. These gentlemen initiated the contact with Browning, hired Browning, and paid Browning for his services. Messrs. Ben Ezra and Weinstein disclosed the facts underlying Ma'ayan's threatened litigation and their role in his resignation from Casablanca. Messrs. Ben Ezra and Weinstein had extensive personal and confidential conversations with Browning about the history of BEW's dealings with Casablanca and its principals; Ben Ezra's and Weinstein's personal and professional backgrounds; BEW's financial status, its corporate history and strategies, as well as comprehensive litigation strategies; and how BEW wanted Browning to handle particular legal situations that could arise and did arise. Browning freely consulted with Messrs. Ben Ezra and Weinstein about how to proceed in response to various situations arising in the Ma'ayan matter and sent drafts of correspondence to BEW or Casablanca for review and comments by BEW, which Messrs. Weinstein or Ben Ezra reviewed and at times revised.

Furthermore, Messrs. Ben Ezra and Weinstein told Browning that they expected that BEW, Ben Ezra and Weinstein would be named as defendants in any litigation that was filed by Ma'ayan and they expected Browning to represent them. Browning never told them that he would not represent them and even discussed the possibility

of bringing a declaratory judgment on their behalf. Finally, and perhaps most importantly, Browning made written and oral representations and a settlement offer on behalf of BEW, Messrs. Ben Ezra and Weinstein, waived claims and denied obligations on their behalf, and offered Ma'ayan's attorney a compromise on their behalf. Exhibit 2, Page 5, Ben Ezra Affidavit.

The preceding facts establish that Messrs. Ben Ezra and Weinstein submitted confidential information regarding BEW to Browning. The facts also establish that Messrs. Ben Ezra and Weinstein had a reasonable belief Browning was acting as their attorney based on their conversations with Browning and on Browning's conduct. Accordingly, this Court should find that an attorney-client relationship existed between B & P and BEW.

C. The Pending Litigation Involves a Matter that is Substantially Related to the Prior Representation

Under the second prong of the test relating to former representation, B & P must be disqualified if the pending litigation involves a matter that is substantially related to Browning's prior representation of BEW. A substantial relationship may be shown if there is a reasonable probability that confidences have been disclosed or if the factual contexts of the two representations are related. In this case, Messrs. Ben Ezra's and Weinstein's Affidavits establish that numerous personal and professional confidences were disclosed to Browning, including some that go directly to the credibility of BEW and its principals, clearly a relevant issue in this and every case. Furthermore, a comparison of the two representations establish that they involve

similar factual contexts. Accordingly, the Court should find there is a substantial relationship between the pending litigation and the prior representation.

The Tenth Circuit has found that "[i]f there is a reasonable probability that confidences were disclosed which could be used against the client in a later, adverse representation, a substantial relationship is presumed." *SLC Ltd. V v. Bradford Group West, Inc.*, 999 F.2d 464, 466 n.3 (10th Cir. 1993). The Tenth Circuit has also found that a substantial relationship exists "if the factual contexts of the two representations are similar or related." *Cole v. Ruidoso Mun. Schools*, 43 F.3d at 1384. *See also UNC v. GAC*, 96 N.M. 155, 243, 629 P.2d 231, 319 (1980) (motions to disqualify counsel are judged based on substantial relationship standard). The standard articulated by the Tenth Circuit is similar to that set forth in the Restatement (Third) of the Law Governing Lawyers §213, which provides that a current matter is substantially related to the prior representation if "(1) the current matter involves the work the lawyer performed for the former client; or (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless the information has become generally known." A substantial risk occurs if use of the information obtained from the prior representation would materially advance the client's position in the pending litigation. *Id.*, comment d(iii).[2]

[2]Confidential information is information relating to the client acquired by a lawyer in the course of or as a result of representing the client, other than information that is generally known. Restatement (Third) of the Law Governing Lawyers §111.

Application of these tests can be found in *SLC Ltd. V v. Bradford Group West, Inc.*, 999 F.2d 464, where the attorney for Bradford Group had previously represented Loran Corporation, the general partner of SLC. SLC was now in bankruptcy and Bradford Group was a creditor. The court held that there was a substantial relationship between the two representations because the attorney had represented Loran in loan workouts, debt restructuring, and the renegotiation of a loan with Bradford; had obtained confidential information regarding the financial positions of various guarantors and Loran; and had obtained confidential information regarding Loran's negotiating strategies and its capacity to settle its outstanding indebtedness. *Id.* at 467. In reaching its decision, the court noted that the requirement of substantial factual relation should not be read to require attorneys to have worked on exactly the same matter. *Id.*

Similarly, in *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980), the attorney for the plaintiff corporation in a breach of fiduciary duty action had previously represented one of the defendants (an officer of the corporation), for one month in a proposed stock offering. The court found there was a reasonable probability the defendant had relayed confidential information to the attorney where the attorney had inquired about the relationship between the defendant, his bank, and the corporation, even though the defendant had refused to answer the attorney's questions. *Id.* at 1000. The court noted that refusal to answer was itself a form of confidential communication. The court also found there was a close relationship between the two representations since there were

allegations in the current litigation regarding the corporation's questionable borrowing and purchase and sale of assets. *Id. See also Aleut Corp. v. McGarvey*, 573 P.2d 473, 475 (Alaska 1978) (attorney was disqualified where court found strong possibility attorney had acquired information adverse to former client and there were similarities between two representations).

In determining whether a substantial relationship exists, courts may also (1) make a factual reconstruction of the attorney's representation of the former client, (2) infer what confidential information could have been disclosed, and (3) decide if that information has any relevance to the attorney's representation of the current client. *Koch v. Koch Indus.*, 798 F. Supp. at 1536. If the matters in question are "relevantly interconnected or reveal the client's pattern of conduct," the representations are substantially related. *Id.* at 1536, 1538-39 (court found substantial relationship, noting that insight and knowledge that firm gained through former representation gave it a material advantage and tilted the playing field). *See also Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225-26 (7th Cir. 1979) (court applied three prong analysis and held there was a substantial relationship where the law firm had represented a defendant on various legal matters relating to its uranium operations and the plaintiff alleged the defendants had engaged in price fixing and had curtailed the supply of uranium); *compare Leon Ltd. v. Carver*, 104 N.M. 29, 32, 715 P.2d 1080, 1083 (1986) (court applied three prong analysis and found law firm's prior representation of lessor and current representation of broker for commissions were not

substantially related where potential confidential information was irrelevant to pending litigation).

In addition, in addressing whether there is a substantial relationship, knowledge of the former client's financial and business background may be a basis for disqualification if the client's background is an issue in the pending litigation. *U.S. Football League v. Nat'l Football League*, 605 F. Supp. 1448, 1460 (S.D.N.Y. 1985). For example, if the pending litigation deals with the market behavior of the former client, then the challenged attorney's knowledge of the client's business plans, economic organization, prospective market position and other background information becomes relevant. *Id.* (attorney's background legal work for USFL as it was being created was substantially related to current litigation in which USFL alleged that NFL monopolized the market for major league football). *See also Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1267 (7th Cir. 1983) (attorney disqualified where court found he may have obtained information relating to former client's profitability, sales prospects, and general market strength, which would be potentially germane to pending antitrust lawsuit against former client).

Once a substantial relationship has been established, an irrebuttable presumption arises that the client revealed facts to the attorney that require his disqualification. *Smith v. Whatcott*, 757 F.2d 1098, 1100 (10th Cir. 1985). The presumption "is intended to prevent proof that would be improper to make." *Id.* Thus, the former client does not have to establish that the lawyer actually received

confidential information and used it against him and does not have to divulge any confidences to prove that they were revealed. *Nelson v. Green Builders, Inc.*, 8223 F. Supp. at 1446.

Here, highly sensitive personal and professional confidences were disclosed to Browning that can be used against BEW in the pending litigation and the matters in question are not only relevantly interconnected, but also reveal BEW's pattern of conduct. In the pending case, BEW asserts that AOL knowingly published false and grossly inaccurate information regarding BEW's stock prices and trading volumes to AOL's millions of subscribers. Complaint to Recover Property Damages ¶¶20-21, 24. The Complaint also alleges that as a result of AOL's actions, BEW stock suffered a dramatic loss in value from panic selling and that as a result of the publication of false stock prices and trading volumes, BEW's reputation and business was harmed. Complaint ¶¶22, 23. In addition, BEW asserts that BEW has been severely damaged by loss of the public's confidence in its stock, momentum, lost product orders, and lost finance and investment opportunities. Complaint ¶¶27.

In the prior case, Browning represented BEW in a situation that looked like it would lead to litigation between Ma'ayan and BEW, Ben Ezra and Weinstein. This litigation would have arisen from (1) BEW advising Casablanca regarding technology and techniques available for assisting them in raising capital for Casablanca; (2) Ma'ayan making misrepresentations to BEW; (3) BEW believing and acting on those misrepresentations by identifying potential investors to Casablanca and by repeating the misrepresentations to these potential investors and (4) BEW confronting Ma'ayan

regarding these misrepresentations and causing his immediate resignation from Casablanca. In the context of this potential litigation, BEW disclosed confidential information to Browning regarding its involvement in Casablanca and its problems with Mr. Ma'ayan; its financial status, corporate history and strategies; and its litigation strategies, and extremely sensitive and confidential personal and professional information about Messrs. Ben Ezra and Weinstein.

This confidential information will be used in and is relevant to the pending litigation. For example, information disclosed to Browning that goes directly to Ben Ezra's and Weinstein's credibility and business acumen will be used against BEW. In addition, AOL has already asserted in a press release that BEW's suit is frivolous and that it only was brought in order to obtain publicity for BEW. Therefore, it can be expected AOL will defend this case by asserting that BEW stock suffered a loss in value not because of anything AOL did or failed to do, but for a myriad of other reasons, including that Messrs. Ben Ezra and Weinstein are bad businessmen, bad judges of character, and their business is suffering as a direct consequence of these latter factors and not because of any acts of commission or omission by America Online, Inc. Similarly, information regarding BEW's financial status, corporate history and strategies, and the personal attributes of Messrs. Ben Ezra and Weinstein will be used by AOL in defending BEW's claim that AOL caused damage to its reputation and business. Thus, the information that Browning obtained through his prior representation of BEW is relevant to the pending lawsuit and reveals BEW's pattern of conduct. Because there is a reasonable probability that the confidences disclosed to

Browning will be used against BEW and because that information has relevance to the present litigation, the Court should find a substantial relationship.

IV. THE DISQUALIFICATION OF B & P SHOULD BE IMPUTED TO AOL'S IN-HOUSE AND NATIONAL COUNSEL

Lawyers who are associated in a firm cannot represent a client when any one of them would be prohibited from doing so. In this case, the disqualification of B & P should be imputed to AOL's in-house counsel, Mr. Boe and Ms. Blumenfeld, AOL's entire in-house legal staff, and AOL's national counsel, Wilmer, Cutler & Pickering because the firms and individuals are currently associated with B & P in the pending litigation against BEW. Accordingly, BEW requests that the Court disqualify AOL's in-house and national counsel from representing AOL in this case.

Under rule 16-110(A), "while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so...." Accordingly, if one lawyer in a firm is prohibited from representing a client, the rest of the lawyers are also prohibited from representing that client. *State v. Almanza*, 121 N.M. 300, 910 P.2d 934 (Ct. App. 1995). Many jurisdictions apply "a per se rule of imputed disqualification to lawyers currently practicing together in close association, without regard to whether there has been an actual sharing of client confidences." *Geisler v. Wyeth Laboratories*, 716 F. Supp. 520, 525 (D. Kan. 1989); *McPartland v. ISI Inv. Serv., Inc.*, 890 F. Supp. at 1032. Unless screening mechanisms have been in place from the commencement of the attorney's association with the firm and those mechanisms are sufficient to overcome the

presumption of imputed disqualification, the law firm will be disqualified with the attorney. *Geisler v. Wyeth Laboratories*, 716 F. Supp. at 527.

In similar manner, the Restatement (Third) of the Law Governing Lawyers §203 provides that the restrictions imposed on a lawyer who has previously represented a client also restrict affiliated lawyers who (1) are associated with the lawyer through a partnership, corporation, sole proprietorship or similar association; or (2) are employed with that lawyer by an organization to render legal services to that organization. Thus, where a lawyer appears as local counsel in litigation principally handled by another firm, each lawyer must comply with the rules concerning conflict of interest and other lawyers in their respective firms are governed by the rules of imputation. *Id.*, comment c(iii). Similarly, lawyers employed by the legal department of a corporation are comparable to partners in a private law firm and the principles of imputed prohibition apply. *Id.*, comment d(i).[3]

Courts have imputed disqualification in cases where law firms act as co-counsel and where there was evidence the firms worked closely together on the pending

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[3]The Tenth Circuit has found that a presumption of disqualification does not apply where a lawyer has moved from one firm to another. Instead, the following four elements must be satisfied before the law firm can be disqualified: (1) the lawyer represented a client whose interests are materially adverse to the client of the new firm; (2) the two matters are substantially related; (3) the lawyer who changed firms must have acquired confidential information that is material to the new firm's representation; and (4) the new firm must know of the conflict. *See* NMRA 16-110(B); *SLC Ltd. V v. Bradford Group West, Inc.*, 999 F.2d at 468. Under this analysis, the burden of proving that disqualification should not be imputed remains with the firm whose disqualification is sought, but the firm is disqualified only when the attorney involved had actual knowledge of material information. *Id.* The Tenth Circuit apparently has not applied this test to concurrent representations. *Parkinson v. Phonex Corp.*, 857 F. Supp. 1474, 1476 (D. Utah 1994) (court applied test in concurrent representation case, but recognized that the Tenth Circuit had not addressed its application in such a situation). However, even if this test is applied to the present case, in-house and national counsel must be disqualified since Browning has actual knowledge of the confidential information that BEW disclosed to him and the preceding discussion establishes that the first and second elements of the test have been met. In light of the fact BEW has informally requested the B & P withdraw, it is presumed B & P has informed in-house and national counsel of the conflict.

litigation. For example, in *Putnam Resources Ltd. v. Sammartino, Inc.*, 124 F.R.D. 530 (D.R.I. 1988), the court presumed that confidential information from a prior relationship had been shared by the two firms acting as co-counsel and therefore disqualified both firms. *Id.* at 533. *See also Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 236 (7th Cir. 1977) (court disqualified both law firms that worked closely together, finding that it was inevitable second firm was afforded opportunity to benefit from privileged information with regard to first firm's former client); *Ackerman v. Nat'l Property Analysts, Inc.*, 887 F. Supp. 510, 518 (S.D.N.Y. 1993) (court disqualified plaintiffs' law firms because they knowingly associated with an attorney who previously represented defendants and who disclosed confidences of his former clients); *Fla. Realty Inc. v. General Dev. Corp.*, 459 F. Supp. 781, 784 (S.D. Fla. 1978) (court disqualified law firms that were co-counsel, noting that to allow second firm to remain in litigation would be to permit first firm to do indirectly what it was prohibited from doing directly--using knowledge gained from its former client in the prior litigation against the former client in the pending lawsuit).

Although there is a general rule that a co-counsel relationship alone will not warrant disqualification, those cases that follow this rule are distinguishable because the tainted lawyer had an imputed, not an actual conflict, or because co-counsel did not have a close relationship. In *Smith v. Whatcot*, 774 F.2d 1032 (10th Cir. 1985), the court refused to disqualify the defendant's trial counsel after disqualifying its appellate counsel because appellate counsel had only an imputed conflict, not an actual conflict;

the trial attorney's contact with appellate counsel was limited to one five-minute phone call regarding possible issues to include on the docketing statement; the trial attorney did not know the attorney who was the source of the original conflict; and the trial attorney had not spoken to anyone else at the other law firm. *Id.* at 1035. *See also Akerly v. Red Barn Sys., Inc.*, 551 F.2d 539, 544 (3d Cir. 1977) (court refused to disqualify co-counsel whose role was peripheral and co-counsel relationship was not active).

In this case, B & P is acting as local counsel for AOL. Mr. Boe and Ms. Blumenfeld are in-house counsel for AOL; Wilmer is AOL's national counsel. B & P's disqualification should be imputed to these lawyers and law firm without regard to whether there has been a sharing of confidences. In the alternative, counsel have the burden of proving that the disqualification of B & P should not be imputed to them. BEW submits that in light of the nature of this lawsuit, it is highly unlikely that counsel can establish that they have only a peripheral connection with B & P's efforts in this litigation. Furthermore, unlike *Smith v. Whatcot*, B & P has an actual, not an imputed conflict. In such a situation, it is inevitable that in-house counsel and national counsel have been privy to the confidential information provided to B & P.[4] If in-house and national counsel are not disqualified, they will be permitted to do indirectly what B & P was prohibited from doing directly--use knowledge gained from BEW in the prior matter against it in the pending lawsuit. Consequently, BEW

[4]BEW has moved the Court to allow it to conduct limited discovery relating to its disqualification motion. Such discovery would include B & P's relationship with AOL's in-house and national counsel.

requests that the Court impute the disqualification of B & P to Mr. Boe, Ms. Blumenfeld, the AOL in-house legal staff, and Wilmer.

V. CONCLUSION

Browning & Peifer, P.A. should be disqualified because it previously represented Ben Ezra, Weinstein, and Company, Inc.; confidential information was communicated to Browning; and the present litigation involves a matter that is substantially related to the prior representation. Browning & Peifer's disqualification should be imputed to AOL's in-house counsel and national counsel because they are currently associating with Browning & Peifer in the pending litigation. Ben Ezra, Weinstein, and Company, Inc. therefore respectfully requests that the Court grant its Motion to Disqualify.

Respectfully submitted,

Esteban A. Aguilar, Esq.
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(505) 242-6677

By: Original signed by ESTEBAN A. AGUILAR
Esteban A. Aguilar

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I hereby certify that a copy
of the foregoing pleading
was **hand-delivered to the
following counsel of record** on
this 7th day of May 1997:

James O. Browning, Esq.
Attorney for Defendant
20 First Plaza, Suite 725
Albuquerque, NM 87102

**via Overnight Mail and
via Facsimile Transmission to
the following counsel of record:**

WILMER, CUTLER & PICKERING
Patrick J. Carome, Esq.
John Payton, Esq.
Samir Jain, Esq.
2445 M Street NW
Washington, D.C. 20037

**and via Overnight Mail to
the following counsel of record:**

Randall J. Boe, Esq.
Elizabeth deGrazia Blumenfeld, Esq.
America Online, Inc.
22000 AOL Way
Dulles, VA 20166-9323

ESTEBAN A. AGUILAR

Esteban A. Aguilar

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May 12, 1997

VIA FACSIMILE AND MAIL

Esteban A. Aguilar, Esq.
1011 Lomas, NW
Albuquerque, NM 87102

Re: *Ben Ezra, Weinstein and Company, Inc. v. America Online, Inc.*,
No. CIV-97-0485 LH/LFG

Dear Mr. Aguilar:

On behalf of America Online, Inc. ("AOL"), I am replying to your letter of May 7, 1997 to James O. Browning, in which you requested that Mr. Browning and his firm, my firm (Wilmer, Cutler & Pickering ("WC&P")) and the entire AOL legal staff withdraw from representing AOL in this case in light of your clients' belief that Mr. Browning has a conflict of interest. Enclosed with your letter, which you cc'd to me and in-house counsel for AOL, were copies of a Motion to Disqualify Counsel for AOL, an Application for Temporary Restraining Order, Motion for Leave to Conduct Limited Discovery pertaining to the Motion to Disqualify, and various supporting papers.

Even though we are convinced BEW's motion for disqualification lacks merit, AOL wishes to avoid wasting time and money, and to avoid burdening the Court, through litigation of an issue that has nothing to do with the merits of this case. Accordingly, AOL has decided to replace the Browning firm with new local counsel. We are presently taking steps to accomplish this and expect that the Browning firm will formally withdraw and replacement local counsel will formally appear within the next few days.

In fact, your assertion that the Browning firm has a conflict of interest that precluded it from serving as AOL's local counsel in this case is without merit. To establish a disqualifying

conflict of interest, you would have to demonstrate both that the Browning firm previously had an actual lawyer-client relationship with Ben Ezra, Weinstein and Company, Inc. ("BEW") and that there is a substantial relationship between the matter on which the Browning firmed allegedly served as BEW's counsel and BEW's present suit against AOL. We believe that neither of these tests can be satisfied.

Since the time that AOL first retained the Browning firm as its local counsel in this case approximately one month ago, Mr. Browning and his partner Charles Peifer have continuously assured WC&P that neither they nor their firm has ever had any lawyer-client relationship with BEW, much less one that would preclude them from representing AOL in this case. They gave the same assurance to BEW's original counsel in this case, namely Joseph Mullins of the Rodey law firm, in a letter dated April 17, 1997 (a copy of this letter is attached hereto). Mr. Browning and Mr. Peifer are ready and eager to disprove Mr. Ben Ezra's and Mr. Weinstein's claims, made for the first time in the affidavits you sent to us on May 7, that the Browning firm represented them. In fact, evidence in BEW's own papers affirmatively indicates there was no lawyer-client relationship between BEW and the Browning firm. (See, e.g., Weinstein Affidavit ¶ 18 (acknowledging that Mr. Browning excluded Mr. Weinstein from certain discussions with principals of Casablanca); February 15, 1996 letter from Mr. Browning to Mr. Reid (referring repeatedly to "my client" (singular) in a manner that obviously did not include BEW)).

With respect to the second prong of the analysis -- whether there is a substantial relationship between the alleged prior representation and the present adverse representation -- your papers fail to establish any relationship (much less a substantial one) between the Browning firm's alleged representation of BEW in connection with the Casablanca matter and the present case. As described in BEW's papers, the Casablanca matter appears to have been an internecine battle within a company to which BEW had made a loan in 1995, while the present case concerns alleged errors in reports of the price and volume at which shares of BEW's publicly-traded stock traded during a very brief time in early March 1997. On their face, the matters seem totally unrelated.

Obviously, if there is no basis to disqualify the Browning firm, there is no basis to disqualify either WC&P or AOL's in-house legal staff. In addition, even if (contrary to the foregoing) BEW were able to show a basis for disqualification of Browning's firm, your suggestion that this would also warrant disqualification of WC&P and all of AOL's in-house lawyers would be totally without merit. Your asserted basis for such disqualification is speculation that the Browning firm has shared confidential information gained from its alleged representation of BEW or its principals with either WC&P or AOL's inside legal staff. But this speculation is completely off base. I now confirm in writing what I told you last Thursday and Friday by telephone: neither Mr. Browning nor any representative of his firm has provided any

confidential information concerning BEW or its principals to me or anyone else at WC&P or anyone at AOL.

The Browning firm has never provided any in-house AOL lawyer with any information whatsoever concerning the Casablanca matter or BEW's connection with that matter. The only such information that the Browning firm has ever provided to WC&P is wholly innocuous, highly general, non-confidential information that the Browning firm conveyed in the course of assuring us that it did not have a conflict of interest in representing AOL in this case. The sum total of what the Browning firm conveyed to WC&P is as follows: (1) that more than one year ago it briefly represented a company that ran some sort of athletic business, that was in some sort of financial difficulty, and that was involved in an internecine dispute with or among its principals; (2) that BEW, which was considering investing in the company, paid for fees that the Browning firm charged to the company; and (3) that the Browning firm never had a lawyer-client relationship with BEW or its principals, had only very limited contact with BEW and its principals, and never received any confidential information from BEW or its principals . At no time has the Browning firm related to WC&P or any in-house AOL lawyer any information relating to the personal or business affairs of BEW or its principals.

In light of the voluntary withdrawal of the Browning firm and the representations set forth above confirming that neither AOL in-house lawyers nor WC&P have received any confidential information from the Browning firm concerning BEW or its principals, we submit that there should be no remaining issue concerning AOL's right to be represented in this case by WC&P and its in-house attorneys. We therefore ask you to withdraw the motion to disqualify that you served last week, that you not proceed with the related TRO application and motion for leave to take discovery, and that you forego any effort to disqualify WC&P or AOL's in-house lawyers.

We look forward to refocusing our attention on the merits of the case. Please respond to this letter no later than noon on Wednesday, May 14.

Sincerely,

Patrick J. Carome

Enclosure
cc: James W. Browning, Esq.

ESTEBAN A. AGUILAR
ATTORNEY AT LAW

May 14, 1997

ESTEBAN A. AGUILAR *
ROBERTA A. BRITO
BETH ADAMS JOHNSON **

* Also Member Texas Bar
** Also Member Minnesota Bar

BEW01/001

VIA FACSIMILE TRANSMISSION
(202) 663-6363

Patrick J. Carome, Esq.
WILMER, CUTLER & PICKERING
2445 M Street NW
Washington, D.C. 20037

RE: *Ben Ezra, Weinstein and Company, Inc. v. America Online, Inc.*
Cause No. CIV-97-0485 LH/LFG

Dear Mr. Carome:

I am in receipt of your letter dated May 12, 1997. I am puzzled by the fact that last Thursday and Friday we had a couple of conversations wherein you inquired whether my client would be willing to negotiate an amicable resolution of the issues presented by Plaintiff's Motion to Disqualify. Yet, your letter of May 12, 1997 completely ignores the substance of our discussions. It looks like you are more interested in posturing for the court than in addressing the substance of the issues we discussed on the telephone.

I assume you discussed the substance of our conversations with your client and your client was not inclined to agree to the terms we discussed. So there is no misunderstanding, let me outline for you our client's concern. Our client retained James O. Browning and his firm, Browning and Peifer, P.A., to represent its interests in connection with the Casablanca matter. During this representation, our client, and its principals, Messrs. Weinstein and Ben Ezra, disclosed sensitive and confidential information to Mr. Browning. In this case, Mr. Browning and his firm were retained by America Online, Inc. to represent it as local counsel. Because of Mr. Browning's prior representation of our client, Mr. Browning obtained confidential and privileged information that defense counsel can now use to the detriment of our client in this case.

EXHIBIT

4501 INDIAN SCHOOL ROAD NE. SUITE 100 • ALBUQUERQUE, NEW MEXICO 87110 • (505) 254-2556 • FAX:

When you called last week, you asked whether our client would agree to allow your firm and AOL's in-house counsel and legal staff, to remain in this case if James O. Browning and Browning and Peifer, P.A. were replaced as local counsel. I told you I could discuss that possibility with my client, provided two conditions were met: (1) Wilmer, Cutler & Pickering and AOL's in-house counsel and legal staff would set forth all communications Mr. Browning made about his involvement with Casablanca, Inc. and Casablanca Enterprises, Inc., and certify that no other representations were made, and (2) AOL, Inc. would agree that nothing pertaining to Casablanca, Inc. and Casablanca Enterprises, Inc., Ari Ma'ayan, Mary Ulberg, or Joel Cutler would be admissible in this case for any purpose. You indicated you were reluctant to agree to the second item because you were concerned that AOL would be deprived of the ability to use the Casablanca information, even though you agreed that my client's "business acumen" is not relevant to this case.

However, I pointed out my client was severely compromised by Mr. Browning's involvement in this case. He should never have agreed to represent AOL in this case. Once he did, my client's only recourse was to come forward and make public the underlying facts pertaining to the prior representation. The only way to ensure that nothing was communicated to you, your firm and AOL's in-house counsel is to protect my client against that possibility. The only effective way to protect against that possibility was to request that AOL, Inc. agree not to use any of the underlying facts regarding Casablanca, Inc. in this suit for any purpose. You expressed concern your client would be deprived of information that was ordinarily discoverable. However, as I mentioned, it is conceivable the Casablanca matters would never have seen the light of day absent Mr. Browning's involvement in this case. The inability to use the Casablanca information is the appropriate remedy, especially, considering that AOL, Inc. retained James O. Browning, and Browning and Peifer, P.A. Mr. Browning immediately should have advised you he had a conflict of interest that prevented him from representing AOL, Inc. in this case. Since he did not, AOL, Inc. should bear the "penalty" for his failure to make such a disclosure.

As you can see, because of the seriousness of these issues, I found it interesting, if not disingenuous, that your letter completely failed to address these issues. In fact, your letter contained a number of inaccuracies or distortions of the facts. On the afternoon of Thursday, April 10, 1997, immediately after my client discovered that Mr. Browning and his firm had been retained as local counsel, it asked Mr. Throckmorton to ask Mr. Browning to withdraw. Mr. Throckmorton telephoned Mr. Browning the following day, Friday, April 11, 1997, and asked him to withdraw.

Mr. Browning refused. Mr. Mullins, once again, made this request in writing, on Monday, April 14, 1997. Again, Mr. Browning refused.

Additionally, your interpretation of Mr. Weinstein's affidavit ignores the substance of what transpired during the meeting in which Mr. Browning asked Mr. Weinstein to step out of the room. Mr. Weinstein was led to believe that Mr. Browning wanted to assure himself that Mr. Cutler and Ms. Ulberg did not have interests adverse to Messrs. Ben Ezra and Weinstein and Ben Ezra, Weinstein and Company so he could determine if he could represent all parties in answering Ma'yan's threats.

Additionally, your interpretation of the February 15, 1996 letter to Spencer Reid from Mr. Browning ignores the fact the letter specifically conveys an offer of settlement on behalf of my client. If Mr. Browning was not representing Ben Ezra, Weinstein and Company, what business did he have making an offer of settlement on its behalf, describing why the settlement offer was being proffered on its behalf, waiving claims on its behalf, denying obligations on its behalf and describing the aforementioned settlement offer as "a substantial compromise"?

Moreover, if the information set forth in your letter is what Mr. Browning conveyed to you, I am more concerned than ever about the information conveyed by Mr. Browning. For example, Casablanca was not an "athletic business," and my clients were never interested in "considering investing in the company." There was not an internecine dispute, and even if there was one, that fact alone should have heightened Mr. Browning's conflict of interest awareness.

This discussion is relevant only because you approached me with the inquiry about allowing Wilmer, Cutler and AOL's in-house counsel to remain in the case. It does not alter our position that Mr. Browning's knowledge should be imputed, and as a matter of law is imputed to Wilmer, Cutler and AOL's in-house counsel and legal staff. Such knowledge and the revelation of the Casablanca matters could be and most certainly would be used to the detriment of our client in this litigation.

Accordingly, we respectfully decline to withdraw our motion to disqualify Wilmer, Cutler & Pickering as well as America Online's, Inc. in-house counsel and legal staff and expect to receive a response to the Motion to Disqualify within the fourteen (14) day period as provided by local rules, which means your response is due on May 22, 1997.

Additionally, enclosed herewith please find a copy of Plaintiffs' Motion to Conduct Limited Discovery which I formally am serving upon you as counsel for America Online, Inc. in the above entitled and numbered cause. I previously inquired of Chuck Peifer whether America Online, Inc. would agree to a stipulated order allowing Plaintiffs to file exhibits in excess of the fifty (50) page limit as required by local rule. This is a matter that routinely is agreed to by counsel, and I again am asking for a response regarding this request. If I do not hear from you, I will assume you oppose my request, and I will file a motion for leave to file the exhibits in excess of fifty (50) pages as required by the local rules.

Additionally, enclosed herewith please find a copy of the Motion to Set Aside or Modify the Initial Scheduling Order filed in this case on April 30, 1997. In light of the issues presented by the Motion to Disqualify Counsel, the Initial Scheduling Order needs to be modified. As grounds for the motion, Plaintiff is alleging that it is improper to proceed with discovery in this matter until the issues presented by the Motion to Disqualify are heard. Accordingly, I am hereby formally serving you with this motion as well. I believe it would be prudent to approach the Honorable Lorenzo F. Garcia by telephone about this Motion as soon as possible. I would be willing to take the lead and arrange for a telephonic hearing so that we do not violate the scheduling order. Please let me know if you will agree to a telephonic hearing on this Motion.

Yesterday, in a conference call, you and John Baugh advised me that Eaves, Bardacke & Baugh, P.A., P. O. Box 35670, Albuquerque, NM 87176-5670 has been retained as new local counsel for AOL. As a courtesy, and at Mr. Baugh's request, I am enclosing a copy of these documents to Mr. Baugh as well. However, by doing so, we are not waiving any issues with respect to the involvement of the Eaves, Bardacke & Baugh firm, all as more particularly set forth in my letter to Mr. Baugh this date.

Finally, please note I am faxing this letter, but all enclosures will follow by overnight mail.

I thank you for your cooperation and assistance in this regard.

Yours very truly,

By: _____
Esteban A. Aguilar

EAA/lcf

Enclosures

cc: Mr. Jack Ben Ezra
Mr. Michael L. Weinstein
Ben Ezra Weinstein & Company
Mark A. Glenn, Esq.
Paul Kennedy, Esq.
Elizabeth deGrazia Blumenfeld, Esq.
Randall J. Boe, Esq.
John G. Baugh, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN, AND
COMPANY, INC.

Plaintiff,

vs.

NO. CIV 97-0485 LH/LFG

AMERICA ONLINE, INC.

Defendant.

**PLAINTIFF'S MOTION FOR
LEAVE TO CONDUCT LIMITED DISCOVERY**

COMES NOW the Plaintiff, by and through its counsel of record, Esteban A. Aguilar, and Moses, Dunn, Farmer & Tuthill, P.C. by Mark Glenn, and Pepper, Hamilton & Scheetz by Paul Kennedy and file this Motion for Leave to Conduct Discovery in connection with Plaintiff's Motion to Disqualify and as grounds therefor would show the court as follows:

1. Plaintiff has filed a Motion to Disqualify Counsel for America Online, Inc.

2. Notwithstanding the provision of FRCP 26, and Local Rule 26.4 (a) and pursuant to Local Rule 26.5(a) in anticipation of an evidentiary hearing on this motion, it is appropriate to allow Plaintiffs to conduct limited discovery prior to the meet and confer conference required by FRCP 26.

3. Plaintiff seeks leave of the court to serve a Rule 45 Subpoena on James O. Browning and Browning & Peifer, P.A. a copy of which is attached hereto as

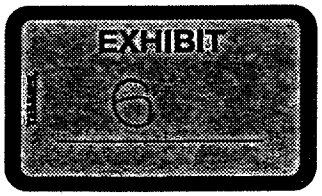

Exhibit "1." The production of the documents sought in the subpoena are necessary for a just adjudication of the allegations contained in Plaintiff's Motion to Disqualify.

4. Plaintiff also seeks leave of the court to take the deposition of James O. Browning on the issues presented by its Motion to Disqualify and the Application for Injunctive relief. Plaintiff also seeks leave of the court to take the deposition(s) of other counsel for Defendant, if necessary.

5. Concurrence of opposing counsel has been sought and denied.

WHEREFORE, Plaintiff prays for an Order allowing it to conduct the aforementioned discovery prior to the meet and confer conference required by Rule 26.

Respectfully submitted,

Esteban A. Aguilar, Esq.
1011 Lomas NW
Albuquerque, NM 87102
(505) 242-6677

Original signed by
ESTEBAN A. AGUILAR

By: _____
Esteban A. Aguilar

Co-counsel for Plaintiff

Paul J. Kennedy, Esq.
Donna E. Correll, Esq.
PEPPER, HAMILTON & SCHEETZ, LLP
3000 Two Logan Square
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Philadelphia, PA 19103

Mark A. Glenn, Esq.
MOSES, DUNN, FARMER &
TUTHILL, P.C.
P. O. Box 27047
Albuquerque, NM 87102
(505) 843-9440

I hereby certify that a copy
of the foregoing pleading
was mailed via overnight delivery
to the following counsel of record on
this 14th day of May 1997:

WILMER, CUTLER & PICKERING
Patrick J. Carome, Esq.
John Payton, Esq.
Samir Jain, Esq.
2445 M Street NW
Washington, D.C. 20037

Randall J. Boe, Esq.
Elizabeth deGrazia Blumenfeld, Esq.
America Online, Inc.
22000 AOL Way
Dulles, VA 20166-9323

John G. Baugh, Esq.
EAVES, BARDACKE & BAUGH, P.A.
P. O. Box 35670
Albuquerque, NM 87176-5670

Original signed by
ESTEBAN A. AGUILAR

Esteban A. Aguilar

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN, AND COMPANY, INC.

Plaintiff,

vs.

NO. CIV 97-0485 LH/LFG

AMERICA ONLINE, INC.

Defendant.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO ALLOW LIMITED DISCOVERY RELATING TO PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL FOR DEFENDANT AMERICA ONLINE, INC.

Plaintiff Ben Ezra, Weinstein, and Company, Inc. (BEW) has moved the Court for an order allowing it to conduct limited discovery relating to its Motion to Disqualify Counsel for Defendant American Online, Inc. (AOL). In its Motion to Disqualify, BEW establishes that Browning & Peifer, P.A. should be disqualified from representing AOL because it previously represented BEW and obtained confidential information from BEW in a matter substantially related to the pending litigation. BEW believes that limited discovery regarding Browning & Peifer, P.A.'s prior representation will further substantiate and support disqualification.

Case law supports allowing limited discovery on the issue of disqualification of counsel. Courts historically have taken a liberal position with regard to discovery and have viewed discovery as a means to define and clarify the issues. *Gheesling v. Chater*, 162 F.R.D. 649, 650 (D. Kan. 1995). Accordingly, the court in *Cheeves v. Southern Clays, Inc.*, 797 F. Supp. 1570 (M.D. Ga. 1992), held that the federal rules relating to

discovery were available to a party who contemplated filing a motion to disqualify a presiding judge as long as the discovery was reasonably calculated to lead to the discovery of admissible evidence in support of the pending disqualification motion. The court reasoned that under the rules, discovery was available with respect to a variety of collateral and ancillary issues. *Id.* at 1580. *See also Kelling v. Bridgestone/Firestone, Inc.*, 157 F.R.D. 496, 497 (D. Kan. 1994) (court allowed use of financial records for limited purpose of motion to disqualify counsel).

Courts considering counsel disqualification motions and the question of substantial relationship do not limit themselves to the allegations in the pending complaint, but also consider the nature of the evidence useful in proving the allegations in order to determine if there is a substantial relationship between the pending litigation and the prior representation. *Trone v. Smith*, 621 F.2d 994, 1000 (9th Cir. 1980); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 226 (7th Cir. 1979); *Koch v. Koch Indus.*, 798 F. Supp. 1525, 1537 (D. Kan. 1992). Courts have also based their decisions regarding disqualification on evidence that appears to have been produced as a result of discovery directed toward the disqualification issue. *See UNC v. GAC*, 96 N.M. 155, 245 n.152, 629 P.2d 231, 321 (1980) (court refers to notes from litigation strategy meeting); *Maritrans v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1281 (Pa. 1992) (court refers to evidence relating to confidential information that was produced from discovery).

In this case, BEW requests limited discovery relating to James Browning, and Browning & Peifer, P.A.'s prior representation. This discovery will produce evidence directly related to BEW's assertion that there was an attorney-client relationship between BEW and Browning & Peifer, P.A. and there is a substantial relationship between the pending litigation and the prior representation. BEW therefore respectfully requests that the Court grant its Motion to Allow Limited Discovery relating to its Motion to Disqualify.

Respectfully submitted,

Esteban A. Aguilar, Esq.
1011 Lomas NW
Albuquerque, NM 87102
(505) 242-6677

By: _____
Esteban A. Aguilar

Co-counsel for Plaintiff

Paul J. Kennedy, Esq.
Donna E. Correll, Esq.
PEPPER, HAMILTON & SCHEETZ, LLP
3000 Two Logan Square
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Philadelphia, PA 19103

Mark A. Glenn, Esq.
MOSES, DUNN, FARMER &
TUTHILL, P.C.
P. O. Box 27047
Albuquerque, NM 87102
(505) 843-9440

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of May 1997:

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Patrick J. Carome, Esq.
John Payton, Esq.
Samir Jain, Esq.
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Washington, D.C. 20037

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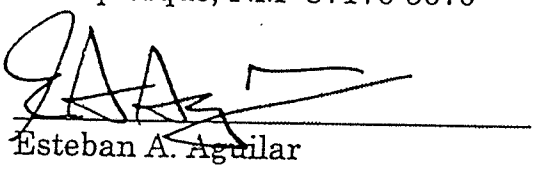


Esteban A. Aguilar

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN, AND
COMPANY, INC.

Plaintiff,

vs.

NO. CIV 97-0485 LH/LFG

AMERICA ONLINE, INC.

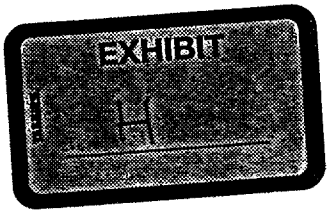
Defendant.

PLAINTIFF'S MOTION TO SET ASIDE OR MODIFY INITIAL SCHEDULING ORDER

COMES NOW the Plaintiff, Ben Ezra Weinstein and Company, Inc. by and through its attorneys of record, Esteban A. Aguilar, Moses, Dunn, Farmer & Tuthill, P.C. by Mark A. Glenn, and Pepper, Hamilton & Scheetz by Paul Kennedy, and files this Motion to Set Aside and/or Modify and change the Initial Scheduling Order filed in the above entitled and numbered cause on April 30, 1997 and as grounds therefore would show the court as follows:

1. On May 8, 1997, Plaintiff served on counsel for Defendants a Motion to Disqualify Defendant's counsel along with a supporting memorandum brief. A copy of the Motion and Brief are attached hereto as Exhibits 1 and 2 respectively.

2. On April 30, 1997, the Honorable Lorenzo F. Garcia, United States Magistrate Judge entered the Initial Scheduling Order requiring the parties to meet and confer no later than May 20, 1997 to formulate a provisional discovery plan. The



order also established other scheduling deadlines, a copy of this order is attached hereto as Exhibit 3.

3. On May 12, 1997, counsel for America Online, Inc., Mr. Patrick J. Carome of the firm of Wilmer, Cutler & Pickering, advised counsel for Plaintiff that America Online, Inc. had decided to replace Browning and Pieffer, P.A. with new local counsel. Mr. Carome also advised counsel for Plaintiffs that new local counsel would "formally appear within the next few days" in the above entitled and numbered cause. Because of the issues presented by the Motion to Disqualify and until the motion is heard, discovery and even the Rule 26(a) conferences would be improper in the above entitled and numbered cause. Additionally, Plaintiff plans on filing an Amended Complaint as a matter of right in this action pursuant to Rule 15, and the filing of the Amended Complaint would extend Defendant's answer date by an additional ten (10) days.

4. In support of this motion, Plaintiff submits its Memorandum Brief in support of this motion.

5. Counsel for Defendant opposes this motion.

WHEREFORE Plaintiff requests that the court modify the Initial Scheduling Order, and delay discovery until such time as the Motion to Disqualify has been decided.

Respectfully submitted,

Esteban A. Aguilar, Esq.
1011 Lomas NW
Albuquerque, NM 87102
(505) 242-6677

Original signed by
ESTEBAN A. AGUILAR

By:_____
Esteban A. Aguilar

Co-counsel for Plaintiff

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Donna E. Correll, Esq.
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Philadelphia, PA 19103

Mark A. Glenn, Esq.
MOSES, DUNN, FARMER &
TUTHILL, P.C.
P. O. Box 27047
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(505) 843-9440

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record on this 14th day of May 1997:

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Patrick J. Carome, Esq.
John Payton, Esq.
Samir Jain, Esq.
2445 M Street NW
Washington, D.C. 20037

Randall J. Boe, Esq.
Elizabeth deGrazia Blumenfeld, Esq.
America Online, Inc.
22000 AOL Way
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John G. Baugh, Esq.
EAVES, BARDACKE & BAUGH, P.A.
P. O. Box 35670
Albuquerque, NM 87176-5670

Original signed by
ESTEBAN A. AGUILAR

Esteban A. Aguilar

ESTEBAN A. AGUILAR
ATTORNEY AT LAW

May 14, 1997

ESTEBAN A. AGUILAR *
ROBERTA A. BRITO
BETH ADAMS JOHNSON **

* Also Member Texas Bar
** Also Member Minnesota Bar

VIA FACSIMILE TRANSMISSION
(505) 883-4406

BEW01/001

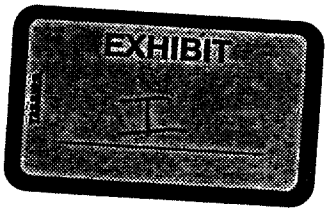
Mr. John G. Baugh
Attorney at Law
Eaves, Bardacke & Baugh, P.A.
P. O. Box 35670
Albuquerque, NM 87176-5670

RE: *Ben Ezra, Weinstein and Company, Inc. v. America Online, Inc.*
Cause No. CIV-97-0485 LH/LFG

Dear John:

This letter will confirm that yesterday, you and Patrick J. Carome and I had a telephone conference call, wherein I was advised America Online, Inc. ("AOL") had retained your firm to represent AOL as local counsel in the above-entitled and numbered cause.

I discussed this development with my client, and you can imagine my surprise to learn that prior to retaining James O. Browning and Browning & Peifer, they consulted with your partner, Mr. Bardacke, to retain your firm to represent it in connection with the Casablanca, Inc. and Casablanca Enterprises, Inc. and Ari Ma'ayan, Mary Ulberg and Joel Cutler matter. Mr. Ben Ezra and Mr. Weinstein recall that Mr. Ben Ezra had at least a fifteen to twenty minute conversation with Mr. Bardacke in which he disclosed to Mr. Bardacke some of the same confidential information later disclosed to Mr. Browning. The law is clear. If Mr. Bardacke was consulted in anticipation of retaining him as its counsel, he had an attorney-client relationship with my client in connection with the very same matter that now will be used against my client by AOL in the above-referenced case. It seems that you and your firm also have a conflict of interest that would preclude your representation of AOL in this case.



4501 INDIAN SCHOOL ROAD NE. SUITE 100 • ALBUQUERQUE. NEW MEXICO 87110 • (505) 254-2556 • FAX: (505) 255-5966

Please advise whether you disclosed this fact to Mr. Carome or to in-house counsel for AOL. Additionally, please be advised my client is not authorizing the disclosure of any confidential attorney-client communications to Mr. Carome, Wilmer, Cutler & Pickering or to in-house counsel for AOL, about the substance of Mr. Bardacke's conversation with Mr. Jack Ben Ezra.

Notwithstanding this conflict, please be advised it is our position that until the pending Motion to Disqualify is heard all knowledge possessed by Mr. Browning is imputed to members of the Wilmer, Cutler firm, and to in-house counsel for AOL, and of course to you as a matter of law.

Please let me hear from you as soon as possible about whether your firm will withdraw from representing AOL in this case.

Also, please be advised that we have relocated. Our new office address is:

Esteban A. Aguilar, Esq.
Beth Adams Johnson, Esq.
1011 Lomas NW
Albuquerque, NM 87102
(505) 242-6677
(505) 242-6655 FAX

Yours very truly,

By: _____
Esteban A. Aguilar

EAA/lcf

cc: Mr. Jack Ben Ezra
Mr. Michael L. Weinstein
Ben Ezra Weinstein & Company
Mark A. Glenn, Esq.
Paul Kennedy, Esq.
Elizabeth deGrazia Blumenfeld, Esq.
Randall J. Boe, Esq.

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ATTORNEYS AT LAW
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SUITE 110-W CITY CENTRE
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PAUL BARDACKE

MAILING ADDRESS
POST OFFICE BOX 35673
ALBUQUERQUE, NEW MEXICO 87176

May 15, 1997

OUR FILE NO.
AM16-001
AGUIL01.LTR

Esteban A. Aguilar, Esq.
1011 Lomas Blvd., N.W.
Albuquerque, NM 87102
242-6677 FAX: 242-6655

Re: Ben Ezra and Weinstein v. America Online

Dear Steve:

I have read your letter of May 14, 1997, to John Baugh, concerning Mr. Ben Ezra's and Mr. Weinstein's claims that they spoke to me about confidential matters in a fifteen- to twenty-minute conversation at some time "prior to retaining" Jim Browning and his firm on a matter having to do with "Casablanca." Accordingly, I have also read Mr. Ben Ezra's affidavit in support of Plaintiff's Motion to Disqualify in this case, in an effort to jog my memory on the subject. I do not know Mr. Ben Ezra or Mr. Weinstein. To my knowledge I have never spoken to either of them nor do I know anything about Casablanca, Inc., Casablanca Enterprises, Ms. Unger, or Mr. Cutler.

I cannot say categorically that a Mr. Ben Ezra or a Mr. Weinstein didn't call me at some time to ask me if I could provide legal services. I <u>can</u> tell you categorically that if Mr. Ben Ezra or Mr. Weinstein called me at any time in the last three or four years and spent fifteen to twenty minutes on the phone talking about a possible representation, I would remember. I can therefore assure you I never had a conversation with Mr. Ben Ezra or Mr. Weinstein of the nature or length described in your letter, and

believe that Mr. Ben Ezra and Mr. Weinstein are simply mistaken. I am prepared to file an affidavit, if necessary, that says all of this. If there is more information you'd like to pass on to me, please do.

Sincerely,

Paul Bardacke

PB/ljc